1986

Carol Ann Barker Brown v. Bryant Jerome Brown : Brief of Appellant

Utah Supreme Court

Bert L. Dart; attorney for respondent.
David A. Mcphie; attorney for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

CAROL ANN BARKER BROWN, Plaintiff-Appellant, vs. BRYANT JEROME BROWN, Defendant-Respondant,	860125-CA Case No. 20714

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County, State of Utah
Honorable James S. Sawaya

DAVID A. McPHIE
147 North Second West
Salt Lake City, Utah 84103

Attorney for Plaintiff-Appellant

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Salt Lake City, Utah 84101

Attorney for Defendant-Respondant

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NATURE OF THE CASE

This is a petition to modify a divorce decree case. The plaintiff appellant, Mrs. Brown, seeks a review of the district courts decision to treat an oral stipulation as dispositive of all issues.

STATEMENT OF THE FACTS

The parties were divorced in February, 1980. The divorce was contested, but settled by stipulation. In the divorce decree the appellant was awarded child support in the amount of three hundred dollars ($300.00) per month for each of three (3) children, and nine hundred dollars ($900.00) per month alimony. The respondant, who is a medical doctor, engaged in private practice as an OB-GYN, was earning approximately sixty thousand dollars ($60,000) per year at the time of the divorce.(T12,22) (References to the transcript follow the assertion made, and contain both page and line number.)

Three years later, the appellant, believing the respondants income had increased dramatically, and having the increasing financial burdons associated with growing children, caused a petition to modify the decree of divorce to be filed.

The petition to modify was filed February 28th, 1983. In it the appellant asked for an increase in both child support and alimony, among other things. (T3,4) The respondant answered, and filed a counterpetition in which the asked for a reduction in child

support, the elimination of alimony, and changes in the visitation, among other things. (T3,6)

Both parties commenced discovery, and extensive discovery was scheduled and completed. (T3,8 and 6,8) It appeared from the discovery that the appellants beliefs concerning the respondants income were correct. Documents supplied by the respondant showed his income having risen from approximately sixty thousand dollars ($60,000.00) per year in 1980, the time of the divorce, to over one hundred thousand dollars ($100,000.00) per year (this includes monies put in a pension and profit sharing plan), at the time of the discovery.(T12,22)

The appellant was told by her then counsel that her position had merit, and that she should prevail.(T6,19) Although the appellant realized that compromise is always a factor to be considered, she concluded, along with her then counsel, to reject various settlement proposals made by the respondant during the period from filing in February of 1983, to the spring of 1984.(T 6,19) Sometime between early 1984 and June 5th of 1984, unbeknownst to the appellant, something went arwry between her and her then counsel in terms of communication. Discussions about various options for settlement were still being had. Both appellant and respondant were proposing settlement terms to one another.

The respondant scheduled the deposition of the appellant to be taken on June 5th, 1984. (T6,19) The appellant had never had her deposition taken before. (T7,18) It appeared at the time of scheduling the deposition, that the matter would go to

trial. A trial date was set for August 12th, 1984. (T3,12)-(T6,5) Although there had been considerable discovery, settlement negotiations did not produce a settlement.

Sometime shortly before the appellants deposition was to be taken, the appellants then counsel, either entered into a settlement agreement with opposing counsel, or indicated that the appellant would be ready to tenter into a stipulation, dispositive of all issues, by the deposition date of June 5th, 1984. (T3,-16 and T6,1)

Counsel apparantly agreed with opposing counsel in advance that the deposition scheduled for June 5th, 1984, would be used for purposes of recording the stipulation only. (T3,17)

The appellant did not know, was not told by her counsel or anyone else, and did not understand that an agreement for settlement had been promised by her attorney. She did not know, and had no way to know, that the deposition time was going to be used to record a stipulation, what the terms of the stipulation were, or why her counsel would agree to the terms of a stipulation, which they had previously rejected, until she appeared at opposing counsels office for the deposition. (T7,5)

When the appellant appeared for the deposition, she then, and only then, learned from her counsel for the first time that:

1. He had reached an agreement with opposing counsel depositive of all issues, an agreement that he thought she should accept;
2. Although the proposed agreement contained terms

appellant and her counsel had previously rejected, that she should agree to them;

3. That although she had always been assured by her counsel that they would do better in court than the terms the proposed agreement provided for, she should accept them because she would do no better in court; and
4. If she would accept the terms of the proposed agreement she could avoid having her deposition taken.

The appellant, because she had never had her deposition taken before, was afraid of it. (T7,19) She was in opposing counsels office, (T7,3) and had the respondant, opposing counsel, and the court reporter waiting while her counsel informed her of the four points listed above.

The appellant was disappointed, dismayed, confused, and felt abandoned. (T7,13) She was disappointed becaue she had been assured by her lawyer during the entire proceedings that the facts warranted an increase in both child support and alimony, and yet, the net effect of the proposed stipulation was to decrease her total support and create an ambiguous and unworkable visitation schedule. The appellant was dismayed because her attorneys position had changed drastically without notice. She was confused because she could not understand why a dramatic increase in her former husbands income should warrant a decrease in her support, and confused because her attorneys assessment of the situation, and

advice was almost the opposite of what she had last heard from him. The appellant felt abandoned because if she chose not to accept the proposed stipulation, she would face deposition, an unknown to her, with what she thought would be unsupportive counsel.

Although a college graduate, in the face of her attorneys advice, a man she had paid more than two thousand dollars and had put all of her faith in for seventeen (17) months, the appellant went into an adjoining room where her counsel, opposing counsel, and her former husband, the respondant, stated an agreement and stipulation dispositive of all issues on the record.(T7,21) The appellant said nothing on the record.(T8,2)

Opposing counsel prepared a written stipulation and sent it to appellants counsel.(T8,18) Appellants then counsel did not send her a copy or notify her that he had received a proposed written stipulation for her to sign until mid to late August of 1984. Upon receiving a copy, appellant immediately contacted her lawyers office. She made an appointment to see him to go over the proposed written stipulation at the earliest possible date. That appointment, however, was three weeks away. (T9,8) She was informed just before the appointment that he had been called out of town unexpectedly, and that he would have to cancel the appointment.(T9,10) The appellant could not get another appointment to see her lawyer for approximately a months time due to his busy schedule.(T9,11) When the appellant was finally able to meet with her attorney, three and one-half (3 1/2) months after the

deposition date, late September, 1984, she discovered that there was no room for adjustments as she had been led to believe. The appellant refused to sign the written stipulation. Her then counsel withdrew on November 7th, 1984. (file page 151)

In the interim period the respondant began paying the appellant two thousand dollars ($2,000.00) per month, which was two hundred dollars ($200.00) per month higher than the obligation under the original decree. He began paying said amount commencing in July, 1984. That was the date the stipulation was to take effect. The stipulation provided that the decree be amended to provide that instead of the appellant receiving nine hundred dollars ($900.00) per month child support and nine hundred dollars ($900.00) per month alimony, the appellant should receive five hundred dollars ($500.00) per month, per child for a total child support obligation of fifteen hundred dollars ($1,500.00) per month.(T8,2) With regard to alimony, the stipulation provided that it be cut immediately from nine hundred dollars ($900.00) per month to five hundred dollars ($500.00) per month, and be eliminated entirely in July, 1986. The net effect of the stipulation was to increase total support two hundred dollars ($200.00) per month for two years and to decrease it three hundred dollars ($300.00) per month in 1986 and thereafter, a net loss to appellant.

The appellant obtained the services of present counsel and after some delay, a copy of the file was obtained. Appellants present counsel wrote to respondants counsel requesting delivery of formerly requested, but as yet unsupplied documents on the 30th day

of November, 1984. This letter called upon respondants counsel to make a motion to enforce the stipulation if he was going to. (A copy of the letter is attached hereto as part of the addendum as Appendix "A".)

Respondants counsel made a motion to enforce the stipulation of June 5th, 1984, as dispositive of all issues on 14th of February, 1985. A hearing was held on April 15th, 1985, at which time the appellant objected to the motion.

Having heard proffers of evidence, Judge James S. Sawaya granted respondants motion and signed an order dated May 1st, 1985, disposing of, and terminating all issues raised in both the petition and counterpetition. Said order adopted the terms of the June 5th stipulation.

It is from that decision and written order of the district court the appellant appeals.

SUMMARY OF ARGUMENT

The court has authority to hear this case. Section 9, Article VIII of the Constitution of the State of Utah; Section 78-2-2, Utah Code Annotated (1953 as amnd); Rule 72A, Utah Rules of Civil Procedure.

There is no Utah Statute on point. Utah Case Law on point is summarized in Madsen v. Madsen, 276 P.2d 917, 2 Utah 2d. 423, (Utah 1954); Klien v. Klien, 544 P.2d 472, (Utah 1975); First Denver Mortgage Investors v. C.N. Zundel, 600 P.2d 521, (Utah 1979); and Higley v. McDonald, 685 P.2d 496, (Utah 1984).

These Utah cases provide that a person should not be bound to a previous settlement agreement or stipulation "if there is any justification in law or equity for avoiding or repudiating it, if timely made." Klein. [Emphasis Added] In First Denver, the court said a stipulation can be set aside "if entered into inadvertantly or for justifiable cause." In Higley the court recited a "well settled rule" that stipulations are typically conclusive and binding "unless upon timely notice, and for good cause shown relief is granted therefrom". Certainly the court is not bound by the stipulation of the parties in a domestic matter, and can make such adjustments as are fair and equitable. Madsen.

The appellants argument in summary is that the overwhelming weight of the credible testimony at the time of hearing was that she felt emotionally ambushed on June 5th, 1984, the date the stipulation was recorded. If ever there were a set of circum-

stances that constituted "good cause" under Higley "inadvertance or justifiable" cause under First Denver or "any justification in law or equity" under Klein, those circumstances outlined in the appellants statement of facts above do.

The appellant was timely within her power to be timely. The respondant knew, or should have known within sixty (60) days of the deposition date when the written stipulation did not come back signed, that there were problems. Instead, he sent the two thousand dollar ($2,000.00) stipulation amount instead of the eighteen hundred dollar ($1,800.00) decree amount from July, 1984 on, ignoring the delays, the withdrawal of his opponents counsel, the entry of new counsel, and request for continued discovery, and a request for a motion to enforce if there was going to be one.(Addendum, Appendix "A") The respondant did not reasonably rely on the stipulation to his detriment. He continued to send the extra two hundred dollars ($200.00) per month despite actual or constructive notice, because it was easy for him to pay, and might provide him an estopple argument later.(Tl2,1)

The appellant inadvertantly, by mistake, inappropriately, through acquiesence in the face of authority figures, and time pressure, has gotten caught in the terms of a fundamentally unfair stipulation. This was the clear, uncontroverted evidence at the time of hearing. The court below, either had too restrictive a view of the law on setting aside stipulations, or misunderstood the weight of the evidence.

The appellant should have been relieved from the stipula-

tion instead of having it enforced against her.

ARGUMENT

Carol Brown, the plaintiff and appellant, waited three years from the date of the decree of divorce to file a petition to modify. In those three years, her former husbands income shot up dramatically from approximately sixty thousand dollars ($60,000.00) per year to over one hundred thousand dollars($100,000.00) per year.(T12,22) Her older children were becomming more expensive, and yet the youngest was not yet in school. She would have filed a petition to modify earlier, but by stipulation she agreed to wait at least 36 months. When she first approached her lawyer she told him what she expected discovery would show her ex husbands income to be. Both she and her counsel were encouraged by the respondants answers to interrogatories and requests for production of documents concerning his income. The appellant was not concerned about the respondant filing a counterpetition for reduction of alimony. Her previous award was without condition or limitation, and her former husbands income had roughly doubled. She did not fear a counter petition requesting a change in visitation. She assumed the court would hear both sides of the visitation issue at trial and make a fair decision.

It took from February, 1983 to spring of 1984, and more than two thousand dollars ($2,000.00) in legal fees to get to the point where trial was set for August of 1984. As the trial date approached, the settlement negotiations began in earnest. To the

best of the appellants knowledge, the parties were never close to settlement.

Although a trial date was set in August, 1984, the respondant wanted to take the appellants deposition in June, and scheduled a deposition for June 5, 1984.

As respondants counsel mentioned at the time of hearing, he exchanged letters with appellants counsel concerning a possible stipulation in May, 1984.(T16,1) The uncontradicted proffer of testimony at the time of hearing was that the appellant never understood, from anything her lawyer said or did, that she would be asked to enter into a stipulation at the time of the scheduled deposition. The uncontradicted testimony further was that the appellant had no knowledge from any source, that she would be asked to stipulate or what the terms of the stipulation might be until the deposition date, the day she was confronted with it.

The further uncontradicted proffered testimony of the appellant was that she and her counsel had never come close to embracing the terms of the June 5th stipulation in thier prior discussions. In fact, the proffered testimony was that she and her counsel had rejected similar proposals as unfair and as less than they should expect as an outcome at trial.

Judge Sawaya indicates in his written notice to counsel of his decision on the motion to enforce that

> "...it would appear that in spite of the plaintiffs protestations, the settlement agreement was fully negotiated between the parties and counsel...and that all parties and counsel agreed to its terms". (File page 190, Addendum Appendix "B")

The only evidence given at the time of hearing on these points

was the appellants testimony, which was absolutely contrary to the Judges finding. The appellants testimoney was that she had never heard the terms of the stipulation until the day of the deposition, and did not know she would be asked to enter into such an agreement until that day. Judge Sawaya's finding that "all parties and counsel consented to the terms" is completely baffling. The appellant never said a word when the court reporter took down the purported agreement.(T8,2) Bert Dart is recorded as speaking as attorney for defendant, Dr. Jerome Brown, the defendant-respondant, is recorded as speaking. Paul Laipis is recorded as speaking as counsel for the plaintiff-appellant, but no where did the appellant agree, consent, or say anything. This was pointed out to the court when the motion to enforce was argued.(T8,2)

At the time of hearing, respondants counsel proffered testimony that he counsel would have given if called to testify. On the other hand, appellants counsel proffered the testimony appellant would have testified to. The testimony of Carol Brown and Bert Dart crossed, but it did not collide. Respondants counsel's testimony concerns his dealings with appellants then counsel, Paul Laipis. The appellants testimony concerns her dealings with Paul Liapis. The respondants counsel's perceptions of what had gone on were obviously different than the appellants. Neither knew the impressions appellants then counsel was giving the other.

It would have been very unlikely that appellants proffer, and respondants proffer given at the time of hearing would contradict each other. Neither was privy to the communications the other had

with Paul Laipis, appellants former counsel. Hence, the proffers do not contradict one another, but rather explain two different perceptions of the same events. Hence, the assertion that Carol Browns testimony is uncontradicted and should be believed. There is not one reason to believe that it is not a completely accurate account of her perception of what happened. Mr. Darts testimony is worthy of the same belief.

To be relieved of the binding effect of the settlement agreement, the appellant must demonstrate "good cause" or "any justification in law or equity" Klein, for so relieving her, and needs to have been timely in bringing up the issue to prevent a claim of reasonable reliance to the detriment of the respondant.

Of the three cases cited earlier in the Summary of Argument section above, only Klein is a domestic case. In domestic cases, the district court has wide discretion, and the broadest equitable powers. In Klein the test imposed on those who would repudiate a stipulation is stated. It is stated in forgiving terms. The Klein requirement is only that "any justification in law or equity be shown". There are cases reported in a number of other states concerning when a party can be relieved from a stipulation previously entered into, whether in writing or in open court. Baird v. Baird, 494 P2d. 1387, (Wash 1972); Cartwright v. Atlas Chemical Industries Inc., 593 P.2d 104, (Oakla 1978); Call v. Marker, 403 P.2d 588, (Idaho 1965); Harsh Building Company v. Bialac, 529 P.2d 1185, (Ariz 1975); Runyon v. City of Neosho Rapids, 585 P.2d 1069, (Kansas 1978); and Thompson v. Turner, 558

P.2d 1071, (Idaho 1977).

These cases, although on point, are no better at articulating what is a good enough reason to set aside a stipulation, than are the Utah cases. They all allow a party to be relieved from a previous stipulation if there is a good reason, and if the question of repudiation arises early enough.

A petition to modify a decree of divorce is essentially the reopening and reconsideration of a divorce, based on new materially and substantially changed facts. Although there are contitutional provisions, statutes and case law involved, the district court, hearing a petition to modify a divorce decree, sits for the most part as a court of equity.

The appellant deserves an equitable outcome to her petition, both as to substance and procedure. So does the respondant. Although the appellant believes the terms of the stipulation are a very bad deal for her, and although your author agrees, the equitable question to be decided is not concerning the substance of the stipulation. It is simply whether or not, under these specific circumstances, the appellant can be relieved from the depositive and binding effect of it.

Judge Sawaya asked of appellants counsel at the time of hearing

> "Did she feel intimidated to the point she felt she could not object at that time?"(T9,25)

Appellants counsel responded

> "I believe she did."(T10,2)

It is difficult to argue from the known facts exactly how disappointed, dismayed, confused, and abandoned the appellant felt

while sitting in opposing counsels office June 5th, 1984, waiting for a scheduled deposition. What she should have done was tell her then counsel she absolutely would not agree, and get up and leave. But because of the time invested, the trust relationship developed with counsel, the money spent, the authority figure counsel represented to her, and the obligation she felt to stay and complete a scheduled deposition, she stayed.

She was afraid of the deposition itself, and especially afraid to go through it with counsel who obviously did not want to go forward. She caved in. She failed to say no. She silently let a stipulation be read into the record.

Clearly, under the circumstances, the appellant meets the Klein test of "any justification in law or equity" for setting aside stipulations in domestic cases.

With regard to timeliness, one only need look at the sequence of events, to see that that the appellant was timely within her power to be timely, and that the respondant did not reasonably rely on the stipulation. Even if he did reasonably rely on the stipulation, it was to his benefit, not detriment.

The stipulation recorded at the scheduled deposition was on June 5th, 1984. Shortly thereafter respondants counsel sent a written version of the stipulation to appellants then counsel for signature. On July 5th, 1984, one month later, the respondant knew the stipulation had not been signed and returned. The respondant, however, hoped the terms of the stipulation were in effect, and sent the appellant two thousand dollars ($2,000.00) instead of

eighteen hundred dollars ($1,800.00) as support. On August 5th, two months later, respondant still knew the written stipulation was unsigned. His counsel was contacting Paul Laipis concerning it. Respondant, again hoping the stipulation was in effect, chose to send the extra two hundred dollars ($200.00). On September 5th, three months since the stipulation was recorded, both the respondant and his counsel knew the proposed stipulation was unsigned and unreturned. Both should have been concerned. The respondant again chose to send the extra two hundred dollars ($200.00). On October 5th, four months later, the written stipulation was unsigned and unreturned. There should have been serious concern on the part of respondant and his counsel. Respondant again chose to send the extra two hundred dollars ($200.00). On November 7th, 1984, five months later, appellants then counsel withdrew as her counsel, sending notice to the respondant. The written stipulation had been neither signed nor returned. The respondant and his counsel knew or should have known the written stipulation would not be signed. The respondant again chose to send the extra two hundred dollars ($200.00) in November of 1984. On November 30th, 1984, appellants present counsel wrote respondants counsel and asked for items of discovery owed, but undelivered. That letter requested the respondant make a motion to enforce the stipulation if one was going to be made. The letter of November 30th, 1984 notified the respondant that the appellant did not intend to be bound by the stipulation. Again, in December, 1984, the respondant chose to send two thousand dollars ($2,000.00)

instead of eighteen hundred dollars ($1,800.00).

The respondants motion to enforce the terms of the stipulation was not heard until April 15th, 1985. In the months of January, February, March and April of 1985, the respondant again chose to send the extra two hundred dollars ($200.00) each of those months.

The respondant agrued at the time of hearing on April 15th, 1985, that he had reasonably relied to his detriment, that the stipulation would be signed, and that he had expended eighteen hundred ($1,800.00) (nine months at two hundred dollars per month) in reliance upon the stipulation.(T16,25)

Obviously, the respondant wanted to rely on the stipulation, wanted to send and have recieved the extra two hundred dollars ($200.00) per month, and conciously chose to ignore all indications that there would be a dispute about it. It was to the respondants great benefit not detriment to send the money each month. The terms of the stipulation were most favorable to him, and acceptance of the money each month by the appellant might provide him an estopple agrument later.

Of course, the appellant kept the money sent each month. Her only source of income was the support. If she had not needed more, she would not have petitioned to modify.

The appellant did all she could, and as soon as she could, assuming as she did, that she should work through counsel to examine the proposed written stipulation, and to noify the other side she would not accept. The respondant, on the other hand, sent the extra money each month, without regard to the notice sent him

actual constructive or implied. It is reasonable to believe he did so because of the potential benefit to him. He did not rely on the stipulation, but rather hoped it would be accepted. If he did rely, it was not reasonable reliance in the face of the notice he had recieved. If he did reasonably rely, it was to his benefit, not detriment.

CONCLUSION

An unusual set of circumstances led to the recording of a stipulation in the office of respondants counsel on June 5th, 1984. For all of the reasons outlined above, the appellant was unprepared to enter into a stipulation that day. Those unusual circumstances, which led to her being surprised and overwhelmed on June 5th, effectively kept her from being able to communicate effectively with her lawyer, and from having sufficient time to make an informed, prudent decision.

Any of the unusual circumstances outlined above, if taken alone, meet the "any justification in law or equity" [Emphasis Added] of the Klein case. When taken in combination, we believe they meet the "good cause" test of any common law case on point which the court may choose to apply. Appellant was as timely as she could be, and the respondant clearly did not reasonably rely to his detriment.

Both the appellant and respondant were cut off just short of trial, with virtually all discovery completed. The decision of the lower court should be reversed, as an error of law, misapplication of the law, or as a decision not supported by the preponderance of the credible evidence. The matter should be remanded for further proceedings.

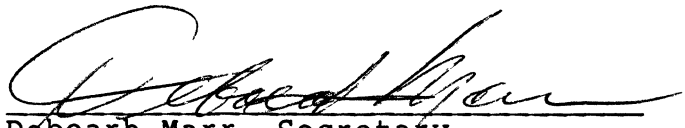
Respectfully submitted this 20th day of August, 1985.

David A McPhie

David A. McPhie, Esq.
Attorney for Appellant

CERTIFICATE OF SERVICE

I hererby certify that I hand delivered two copies of the foregoing Brief to attorney for respondant, Bert L. Dart, at his office located at 310 South Main Street, Suite #1330, Salt Lake City, Utah, on this 20th day of August, 1985.



Deboarh Marr, Secretary

November 30, 1984

Bert L. Dart
10 Broadway Bldg. #430
Salt Lake City, UT 84101

Re: Brown vs. Brown - Petition to Modify Civil No. D79-3802

Dear Bert:

Mrs. Brown has contacted me, and retained me for purposes of representing her in this matter. She has recieved your Notice to Appoint Counsel, and you'll find enclosed with this letter a copy of my Entry of Appearance.

I have been informed that you're anxious to set a hearing, at which time the deposition taken on June 5th will be argued by you to be a binding stipulation. Please send me your motion and notice of hearing thereon, and we will gladly appear.

I have noticed in going over some of the documents supplied by Mr. Liapis that we do not have Dr. Brown's 1983 tax return which was requested by Mr. Liapis prior to withdrawing. Please send me copies of that tax return at your earliest convenience.

I can see that a substantial amount of discovery has already been done in this case, and I will not attempt to do any new discovery that I don't feel is absolutely necessary. I know that your client must be anxious to resolve this matter now, I know mine is. If I discover an area in which I think further discovery is necessary, I hope to be able to contact you informally and obtain the information without formal discovery

Appendix "A"

procedures. In this way we can shorten the time it takes to get a trial setting in this matter.

Very truly yours,

APPLEGET & McPHIE

David A. McPhie

DAM:ko

cc: Carol Brown

FILE NO. D79-3802

(✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
CAROL ANN BARKER BROWN	B. L. Dart
V	
BRYANT JEROME BROWN	David A. McPhie

CLERK

REPORTER

BAILIFF

HON. James S. Sawaya
JUDGE

DATE: April 16, 1985

The matter of Defendant's Motion for Order Approving and Enforcing Settlement Agreement came on regularly for hearing on April 15, 1985 with appearances as above indicated. The matter was fully presented, argued and submitted and the decision thereof taken under advisement by the Court. The Court, having now fully reviewed and considered the matter makes its ruling and decision thereon as follows:

It would appear that in spite of Plaintiff's protestations, the settlement agreement was fully negotiated between the parties and counsel; that all issues were considered and an agreement was struck and entered on the record and that all parties and counsel consented to the terms. Equity dictates that the sanctity of that agreement should be preserved and should prevail. Defendant's Motion is granted.

COPIES TO COUNSEL

Appendix "B"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * * *

CAROL ANN BARKER BROWN, Plaintiff, vs. BRYANT JEROME BROWN, Defendant.	Case No. D 79-3802

TRANSCRIPT OF PROCEEDINGS

A P P E A R A N C E S

DAVID A. McPHIE, Attorney at Law, Affleck and McPhie, 147 North Second West, Salt Lake City, Utah 84103 appearing on behalf of the plaintiff.

BERT L. DART, Attorney at Law, 310 South Main Street, #1380, Salt Lake City, Utah 84101 appearing on behalf of the defendant.

Proceedings before the Honorable Judge James S. Sawaya on April 15, 1985

CATHY GALLEGOS
Official Court Reporter
License No. 177
240 East 400 South
Room A-533 Courts Building
Salt Lake City, Utah 84111

BE IT REMEMBERED that on this the 15th day of April, 1985, the above-entitled and numbered cause came on for hearing before said Honorable Court, Honorable James S. Sawaya, Judge presiding, in Salt Lake City, Utah, County of Salt Lake, whereupon the following proceedings were had, to wit:

THE COURT: Back to number one, Carol Ann Barker Brown versus Bryant Jerome Brown, defendant's motion for order approving and enforcing a settlement agreement. Mr. Dart, you appear for the defendant?

MR. DART: This is the defendant's motion. I am representing the defendant and making the motion. Has the Court had an opportunity to read the motion and affidavit in support thereof?

THE COURT: I have to confess I haven't.

MR. DART: I will lay out the facts very quickly.

THE COURT: David McPhie appears for the plaintiff, and do you want this reported, counsel?

MR. DART: I don't think a record is necessary.

MR. McPHIE: It may be necessary to have it reported.

MR. DART: Your Honor, the facts are that Mr. and Mrs. Brown were formerly married to each other and were divorced under the terms of the decree of divorce, which

gave to Mrs. Brown custody of three children, provided her support, alimony and visitation rights. And in February of '83, over two years ago, Paul Liapis representing her, filed a modification asking for an increase in alimony and child support. On behalf of Mr. Brown, I filed a counter-petition asking for an elimination of alimony and for modification of visitation rights. Through a year and quarter's time frame, we engaged in substantial discovery in the form of interrogatories, interrogatory answers. I had noticed the deposition of the plaintiff on the 5th of June and Paul Liapis had filed a request for trial setting. We were dealing against I think an August 12 trial date last summer. Mr. Liapis and I exchanged letters on that settlement. There were several letters that came back and forth. On the day before the deposition, which was set for June 5th, Paul called me and said, "We are settled. Why don't we utilize the deposition time to make an agreement. That agreement will then be put into a written form to conform with an order." On the 5th of June the court reporter, all parties being present, related that we were there to set down the agreement that we had reached and did so. The agreement effectively put a terminus point on alimony. However, it also reduced alimony, however, increased support. Instead of paying eighteen hundred dollars a month, nine hundred dollars alimony and nine

hundred dollars support, the doctor's obligation, defendant's obligation would be increased to a two thousand dollar figure, two hundred dollars a month increase by stepping up child support five hundred for a total of fifteen hundred in the form of support, five hundred for alimony.

There is also a comprehensive agreement with regards to visitation, what circumstances, holidays. I prepared a stipulation based upon that transcript. There's no question what the stipulation accurately reflected the agreement of the parties. I sent it to Paul Liapis. We had some problems in September I talked to him about. The stipulation was not signed. He said he would get it signed. He sent a letter to his client at that time. In the mean-time in July it took effect. He started making the increased payments of two hundred dollars a month, now, ten months paid of two hundred more a month, a total of two thousand dollars more than he's paid above what the original order was based upon the stipulation, which amounts have been received by the plaintiff without objection.

In addition, the trial date for August was stricken. I think the Court would find a letter from myself indicating the case had been settled. In November, I wrote to Paul again saying, "I need a stipulation so we can close this file out." Next thing I received from Paul Liapis was a withdrawal. Then the next thing I received was

communication from Mr. McPhie indicating that he was representing the plaintiff in this action and he wanted to continue with discovery, and I inferred from that he did not at that time--the plaintiff did not at that time accept the stipulation. We were five months from the day we sat down and agreed, three or four months from the date that a written stipulation had been presented, with no objection being made, no indication that the stipulation wasn't acceptable, with summer visitation based upon the stipulation and with the payments, as I say, having been made by Mr. Brown having the effect of the two thousand dollar increase in the amount paid over what he was ordered to under the original order, but also a reduction in the amount that constituted alimony. So for this past ten months, he's been paying three hundred dollars a month less alimony that he cannot take as a deduction for his taxes. The short and tall of it is the agreement is not--does not claim to be unconscionable, does not claim to be contrary to what was discussed and presented in the presence of the plaintiff. There's only the claim that she doesn't want to at this time. Her conduct, sitting on it the last ten months, accepting the benefits of it, should be basis for estoppel. She should be bound by it. The Court should enter an order.

THE COURT: Mr. McPhie.

MR. McPHIE: Thank you. Mr. Dart's representations

of the facts essentially are accurate. As far as his recitation of facts went, this was commenced a couple years ago. There has been extensive discovery. Mr. Liapis did formerly represent Mrs. Brown. There was a trial date set in the summer of '84, I believe. And prior to that, there were in the spring of '84 negotiations for settlement, offers being sent back and forth. There was a deposition for Mrs. Brown scheduled by Mr. Dart and I have no reason to disbelieve Mr. Dart's assertion that Mr. Liapis called him prior to the day the deposition was set for, which was June 5 of '84, indicating that he believed there was a settlement and that Mr. Dart expected that when Mr. Liapis and his client came to that deposition, they would be stipulating. That's where the facts diverge, however. Mrs. Brown would testify--she has an affidavit in the file to the effect that although they were discussing settlement offers being made by Mr. Dart and they were responding to them with counteroffers and they were going back and forth, she was always being assured by Mr. Liapis that the things that she had asked for in her original petition in the way of increases in support were justified. This was the basis for her retaining him at the outset and that was her position throughout, including the spring of '84 when they were discussing the possible settlements that were being discussed back and forth.

Her further testimony would be that on the actual day of the deposition, June 5th, '84, at his office, being Mr. Dart's office, Mrs. Brown learned for the first time that her former counsel essentially no longer believed that she would come out as he had led her to believe throughout the entire period, that he not only had received the settlement offers from Mr. Dart but that he believed that she should accept them. This is the--I suppose the disconcerting item to her is it was that day that she first learned or came to understand that he not only was reciting to her what they were offering. He had changed his position and felt that she should accept it and she did not understand that until up to that time and was very dismayed about it, felt that she was being put in the position of "If you agree to this, you can avoid having your deposition taken."

Now, you and I would not fear having our deposition taken. Mrs. Brown had not, I believe, had her deposition ever taken before, was afraid of it, did not understand what it exactly entailed, apparently, and in the face of having spent a lot of time with Mr. Liapis, acquiescing somewhat in the face of authority figure to her, being very dismayed, being very confused, not knowing what to do, then proceeded into a room where this deposition was reported. It is ten pages in length. I have read it carefully. Mr. Dart

speaks on the record. The defendant, Mr. Brown, speaks on the record. Paul Liapis speaks on the record. Never does Carol Brown, my client, speak on the record. Her testimony would be that she did not understand the agreement. She wasn't in agreement with it. She felt bushwhacked and ambushed on the day of the deposition. She, for the first time, had her attorney advising her that she had to do it under the pain of having her deposition taking, which she didn't understand and she was not in agreement with it and said nothing about it on the record.

Mr. Dart argues that my client has taken the benefit of the two hundred dollar increase for ten months now and acquiesced and benefited from the stipulation while she seeks to get out of it. The facts surrounding that are simply this: Mrs. Brown would testify that after having left Mr. Dart's office, it was her understanding that Mr. Liapis would be preparing a stipulation, turns out that it was agreed that Mr. Dart would prepare it. Mr. Dart sent a written stipulation, which I have also read and which does fairly reflect that which was taken down at the deposition, to Mr. Liapis and asked him to have his client sign it. Mrs. Brown was not contacted by Mr. Liapis until two and a half months after the deposition--was the first time she was ever notified that he had produced a written document of what purported to be the stipulation and that she was to

sign it. When she got notice that he had it, it was because he sent her a letter with the copy which she immediately read and was dismayed to see what it said and tried to make an appointment to see Mr. Liapis to discuss it. Her testimony would further be for the first time she tried to get in to discuss it she was told she wouldn't get an appointment for three weeks. The next time she went--she went to go to the appointment three weeks later, she was told when she got there that they had been trying to get ahold of her not to come because Mr. Liapis was out of town. There was approximately another month or more delays in getting together with Mr. Liapis. So you are now three and a half months from the deposition date when she finally got to him with a written copy and discussed it and said she felt the terms were very unfair and unreasonable. I will indicate to the Court in a moment what the terms are--is when the dispute arose between them. She would not sign. He did not want to continue to represent her.

THE COURT: Wasn't she present when the terms of the stipulation were stated for the record?

MR. McPHIE: She was.

THE COURT: Did she recant or object at that time?

MR. McPHIE: She said nothing.

THE COURT: Well, I suppose what we ought to do--why not? Did she feel intimidated to the point she felt

she could not object at that time?

MR. McPHIE: I believe she did. Then is when Mr. Liapis withdrew as counsel and that was the first notice that Mr. Dart had really that the stipulation would never be signed, but you are now talking four months since the stipulation was entered into on the record, and in fairness to Mr. Dart, he didn't know for four months. He knew--I should say he had reason to suspect when he didn't get a signed stipulation from counsel. Since that time it is true she's taken the additional two hundred dollars and frankly she's asked if she should continue to take that, and that's eighteen hundred dollars moved up to two thousand dollars, and she may have been advised to hang on to that money because the result of this was not yet clear. We filed a request for additional discovery. Obviously, Mr. Dart then discovered that certainly we were not intending to sign the stipulation and he made this motion to confirm the stipulation which was previously taken on June 5th, as per order of the Court.

We seek now to avoid that, after two years time and many many thousands of dollars on both sides and being nearly ready for trial to simply try the case, and there's a case, Your Honor, cited by the Utah Supreme Court in 1975- Mr. Dart already has a copy and, in fact, may have a copy in the file already because I believe Mr. Dart submitted

a copy of this case when it was argued before the Commissioner--it's a divorce case. The facts are not exactly the same but the Supreme Court of the State managed to articulate, in Kline, a number of points of law surrounding stipulations, especially in domestic cases. I think that some of the things that are pointed out in the Kline case are the differences between stipulation of facts and stipulations to outcome in a domestic case, which is essentially equitable in its nature. The difference between whether you should let a person out of a stipulation in a domestic matter based on reasonable reliance of the party who has relied on the stipulation and timeliness. It makes distinctions in terms of whether the Court thinks that a stipulation is fair. One of the things that I discover in this work of domestic work, the Court is not bound by the stipulation in domestic cases. He can take them as advisory, can enter different rulings. We see that where a wife wants to take too little child support or where parties want to have joint custody of the children and the Court simply won't approve.

Let me just address those for a second. This is a stipulation totally with regard to outcome, not a single fact is stipulated to. There was no information in this about the income of Dr. Brown, whether it did increase or whether it didn't increase. With regard to him having relied

to his detriment, it is true he has paid according to the stipulation that was entered into ever since July of 1984, but he's known since some time in the late fall of '84 that that was not accepted by Mrs. Brown, yet he's chosen to continue it. Why? Well, he would like to be able to argue day past conduct and in the course of dealing and it's an insignificant amount to Dr. Brown. It's eighteen hundred dollars moved up to two thousand dollars. Mr. Dart has explained the terms of the stipulation. Mr. Brown formerly had in the divorce decree nine hundred dollars alimony, nine hundred dollars child support. The stipulation provides that her alimony decrease immediately four hundred dollars and drop off completely to zero in another two years. But it does provide for an increase of two hundred dollars per child in child support. Child support goes up six and alimony goes down four, and she ends up with two hundred dollars a month increase but in two years she ends up with a four hundred dollars a month decrease. If that's a good outcome for Mrs. Brown, in the face of the discovery that was already in the file when the stipulation was taken or recorded, I don't know what a bad outcome would be.

The documentary evidence is that Dr. Brown's income has gone somewhere between fifty and sixty thousand dollars at the time of the decree to up between ninety and a hundred thousand dollars at present. That's not including

money he pays into a pension and profit-sharing plan that would kick it up over a hundred thousand dollars. If she came out behind it wasn't a good deal. I don't think this is binding in the case of equity upon this Court.

With regard to the argument that she wasn't timely, it was four months before she could even get together with Mr. Liapis and find out what the stipulation that had been sent to her was. She knew as soon as he withdrew, which was as soon as she could talk to him, that she didn't want to be bound by that, that she didn't agree to it. She thought she had been bushwhacked and if they sent the money, additional monies, the Kline case clearly states it is within the discretion of the Court to relieve either of the parties of a domestic matter where just cause exists. I don't think he's relied to his detriment, certainly an adjustment can be made at the time of trial. It's not hard to make an adjustment if this case is tried that will make up to the two hundred dollars a month he has sent by simply reducing it, will reduce in his favor. We think he will be obligated to pay more. She was timely within her power to be timely. I think that it's unfair because if in the face of a massive increase by Dr. Brown gives her less money overall, that's the reverse of what she went to counsel for, not a good deal for her, not fundamentally fair.

What it boils down to in my opinion is whether or

not in a domestic case where the parties are getting together for the purpose of stipulating to outcome, where this woman is going to get stuck with an agreement pre-made between her attorney which she never understood or agreed to, now, you can say she was there and she heard. All I can say to you is having had many divorce clients try to recite back to me what they just agreed to in domestic matters and not having them even come close, I can tell you that it is very easy to misunderstand for a layman. It is very easy to misunderstand your attorney telling you what proposed offer and what your own attorney tells you what he thinks you should accept. She didn't understand when you ar in a case where a great deal of discovery has been done, there is almost nothing left to do and she simply should have the trial on the merits at this point.

As a back-up position, let me argue this. The stipulation should have some value but it shouldn't have the value of her being held to it right now. Let them put it on at the time of trial, the evidence of what she was willing to agree to on July 5, but if that is taken along with the evidence that I would be able to present about Dr. Brown's income and if the Court takes the stipulation for what it is worth in comparison with all the other evidence, I am not afraid of the outcome. But to simply order that she is stuck with that, under the circumstances, I thir

we have shown some just cause and/if the Supreme Court said she could be believed/relieved from that, I think it simply is setting us up to have another petition to modify and putting her off for another period of time so that she can come back and claim some change of circumstances. We are too close to the final outcome to waste everything that's been done because of what was said in the stipulation.

MR. DART: Very briefly, it needs to be kept in mind that the settlement was reached in circumstances where there was an August trial date, where there was a petition for termination of alimony at that time, where the plaintiff in this action has a college degree, had a teaching certificate at one time, has a real estate license, where the children at the time of the divorce were from three to nine--by the time of the trial last August would be between fourteen and eight and that the exposure of termination of alimony while she was receiving counsel with Paul Liapis bargained for a two-year alimony award and two hundred dollars step up, she came into the deposition afraid of the deposition and for the first time, in her language, that it completely amazed and bedazzled her, that it wasn't until she got the stipulation two months later, she didn't understand until then. We wrote a letter to Mr. Liapis setting down all the issues and our position on all the issues. Mr. Liapis sent us a four-page reply letter dated

May 10 talking about termination of alimony and a time frame concerning alimony and support, visitation rights. A copy of that letter was sent to Carol Brown on the 10th of May. Then sent another letter on the 30th of May with some final adjustments. Those letters were in the file and apparently in the possession of the plaintiff before the time of this deposition. If she was surprised at the time of the deposition, I think she had a duty to respond a little quicker than she did. She knew what had been said. She could have contacted her attorney and let her know of her reservation by phone, letter or some manner. She never did do that. My last letter to Paul was the 2nd of November saying, "Where are we on the stipulation?" It was only after that that I received his withdrawal. The Kline case does indicate--Mr. McPhie is correct this is an area where the Court has substantial discretion. It is within the Court's discretion to accept the stipulation and enforce it or set it aside. But in circumstances if this is not an unconscionable stipulation, there is a situation that is in the interest of justice that it be enforced unless there is a justification for avoiding it. As they say in the Kline case, if there's any justification in law or equity for avoiding or repudiating a stipulation and he timely does so, he's entitled to be relieved from it, otherwise not. We have ten months of receipt of benefit, five months with not

a word. We have had the loss of a trial date. Under the circumstances, there should be an estoppel. Thank you.

THE COURT: Let me read this case. It is new to me. I will have you a ruling within a day or two.

MR. DART: Thank you.

* *

CERTIFICATE OF COURT REPORTER

THE STATE OF UTAH)
:
COUNTY OF SALT LAKE)

I, Catherine Gallegos, Official Court Reporter in and for the Third Judicial District of Salt Lake County, Utah, do hereby certify that the above and foregoing type-written pages contain a full, true and correct transcription of my shorthand notes taken upon the occasion set forth in the caption hereof, as reduced to typewriting by me or under my direction.

Witness my hand, this the 24th day of June, 1985.

Cathy Gallegos, Official
Court Reporter, CSR

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

* * *

CAROL ANN BARKER BROWN,	§	
	§	
Plaintiff,	§	Civil No. C79-3802
	§	
vs.	§	STIPULATION
	§	
BRYANT JEROME BROWN,	§	
	§	
Defendant.	§	

* * *

BE IT REMEMBERED that on the 5th day of June, 1984, the Plaintiff and Defendant met with counsel at the offices of Dart, Adamson, Parken & Proctor, 310 South Main, Suite 1330, Salt Lake City, Salt Lake County, State of Utah, and agreed to the following Stipulation:

APPEARANCES

For the Plaintiff: MR. PAUL H. LIAPIS, ESQ.
Austin, Adams, Kasting & Liapis
Attorneys at Law
48 Post Office Place, Third Floor
Salt Lake City, Utah, 84101

For the Defendant: MR. BERT L. DART, ESQ.
Dart, Adamson, Parken & Proctor
Attorneys at Law
310 South Main, Suite 1330
Salt Lake City, Utah 84101

* * *

S T I P U L A T I O N

MR. DART: For the benefit of the record that we're staring, we have been discussing with both clients and both attorneys various settlement proposals that have gone back and forth over the past month and a half, two and a half months, excuse me, and we now have reached a point where we have a settlement understanding that we're all desirous of having put down in writing. And to that end we're going to read it into the record, and then we'll obtain a transcript so that any confusion that might exist in the future can be clarified by that transcript and then there will be a formal written stipulation and a formal order drafted based upon the agreement we reached today.

The stipulation would be that in connection with the currently pending petition for modification, that that petition will be resolved by amendments and agreements as follows:

Number 1, the alimony award currently existing shall be modified to provide that Mrs. Brown, commencing with July of 1984, will have her alimony payment reduced from the current level of $900 to the sum of $500, and that that payment shall continue for a period of two years, at which time it will terminate. And that this payment of alimony shall be payable on or before the fifth day of each month.

It's been expressed that there are difficulties

in the house payment being paid, and as an accommodation, if the doctor can make payment before the 5th, he is of an awareness that there is a desire that that be done.

I think it also ought to be expressed that the modification of alimony is made on the contemplation that by two years from now Mrs. Brown will have been able to have sought and obtained employment sufficient to allow a termination of the alimony award.

The support will be modified commencing with the month of July to be increased from the current amount of $300 per child to the sum of $500 per child for each of the three children. Payments of support are due and payable on or before the 5th, and the payment of support shall continue to age 21, on the same terms that existed in the decree of divorce as to the conditions of which payment would continue. I think those were that the children be, unless they became married or emancipated or not continue with their school.

DR. BROWN: It's eighteen unless they serve a mission or go to college, and then it continues to age twenty-one.

MR. DART: Whatever the terms of the decree are, they will provide, except with the modification that any child not living at home will have the payment of support paid directly to the child after age eighteen.

MR. LIAPIS: With the proviso that the Plaintiff

will have the right for enforcement of collection if they are not paid directly to the child.

MR. DART: The doctor also will agree to pay for orthodontia treatment which has been provided to this time by Dr. Gary Stephens, the outstanding bill at this time, and I think it also should be expressed that he will have to possibly make some arrangements to possibly make some installments, but I don't know what it is.

That he, further, will be responsible so long as there is an obligation for support, to pay the children's orthodontia and dentist expenses. He shall further be responsibl to continue to maintain the children on his health and accident insurance, which has a $100 deductible. Any expenses not describ or covered by insurance would be the responsibility of Mrs. Brown for her health and treatment.

The doctor also will continue in force his current existing life insurance that has the children as beneficiaries, and that obligation will continue so long as there's an obligatio for support. He will also continue in force his currently-existing life insurance on Mrs. Brown so long as he has an obligation for alimony. It's my understanding that the policy on this, it's a $50,000, and also the children's is a $50,000 policy.

MR. LIAPIS: Further, the doctor will pay against attorney's fees that have been incurred by Mrs. Brown in

this proceeding. The amount of these fees to the sum of $1,500. When?

MR. DART: Within thirty days of billing. And I think that covers all of the financial items that we've discussed. If it doesn't, let me know.

The agreement relating to continuation of health insurance should have, as part of it, the understanding that Mrs. Brown would have the obligation of providing to Dr. Brown the medical and dental and orthodontal bills within a reasonable time not to exceed thirty days of when they are received. Paul and I discussed this, assuming there is an item that has not been discussed and not mentioned here, and so it is an item of oversight, that either side would have the right to get an agreement on that or have the Court solve it.

MR. LIAPIS: That's correct.

MR. DART: The next item that has a financial component is that the original decree of divorce provided that the Jordan Credit Union, Valley Bank, Olympus Branch, and Draper Bank accounts that were accounts for the children be transferred to Mrs. Brown. Dr. Brown thought that he had done that, and it's his recall that he had provided you with signature cards sufficient to do that and thought that that was an accomplished fact. If it is not an accomplished fact, he's willing to, of course, do that.

The stipulation will be that Mrs. Brown will

provide to Dr. Brown the account numbers on each of the involved accounts and that Dr. Brown will take whatever steps are necessar to have his name removed from the accounts so that Mrs. Brown's name can be placed on the accounts.

The next area is the area of Dr. Brown's rights of visitation, and the understanding and agreement relating to that visitation is that he will have reasonable rights of visitation with the minor children, and that his rights of visitation, in addition to anything we describe, will include anything that the parties can mutually agree upon.

I put that in so that you're both aware that you're not locked into this if you both agree to something different. But beyond that, his rights of visitation would be to have, A, the children with him on alternate weekends with that visitation right being altered from its current full weekend period to provide from Friday evening at 6:00 p.m. to Saturday evening at 6:00 p.m.

Two, the agreement is that Mrs. Brown will not schedule any activites for the children which will in any way conflict with Dr. Brown's visitation time without first consultir with Dr. Brown, and in the event that the parties are not able to agree on such an activity being scheduled for Dr. Brown's visitation time, then either party would have the right to bring the matter before the Court for a determination.

Upon scheduling activities occurring at Dr.

Brown's visitation time that he agrees that he will do whatever is necessary to see that the children participate in that activity. And another element of that, Mrs. Brown will provide reasonable advance notice of any of the activities that the children are involved in, and that there be at least some advance notice, as much as possible, of any of the activities the children are participating in in which they are performing in a competitive activity or in which they are participating in front of an audience that includes adults or other parents.

Dr. Brown would have the right to have the children on alternate holidays, and I think that's scheduled in the decree of divorce. And when those holidays are Monday holidays which come on the weekend he has visitation, he'd have the full weekend for three days, including Sunday. So he'll have visitation on those weekends would be from Friday at 6:00 until Monday at 6:00 p.m.

He would have the right to have the children each New Year and during the Christmas holiday commencing Christmas Day at 1:00 o'clock, that that visitation will continue through the remainder of the Christmas vacation unless there are less than five days of Christmas vacation before Christmas, and in that event, then the time will have to be worked out so that she has at least five days during the Christmas break.

That in the summer he will have the right to

have them with him for a month, and this year that will be the month of July. That while he is out of town he will provide an itinerary, and a reciprocal is that when Mrs. Brown takes the children out of town, she will also provide an itinerary for Dr. Brown.

That during the month of July while he is in town, Mrs. Brown will have the right to contact the children by phone and they will have the right to contact her by phone, and she'll be entitled to have one visit with them during that time.

The visitation each summer will be agreed upon with Dr. Brown to notify you at least sixty days in advance of when he would like to have the month, and at the same time you and he work out an agreement as to one day during that period that you would have the right to have them. And the same understanding on the right to converse with them while they're in town by telephone would exist and also the need to provide you with an itinerary would also exist.

The understanding is that the parties will consult at least ninety days before the beginning of the summer of their anticipated schedules to make sure that there are no conflicts and to try and flex around potential conflicts that might exist. If there is a conflict, either party would have the right to ask the Court to resolve it if it gets to that point.

And further, Dr. Brown would represent that as soon as he knows when he might be going, even if it's five or six months in advance, he'll provide you with that notice. Also, if the children are going to be offered an opportunity to register for summer activity that requires an early registration, you'll notify the doctor so he can let you know whether that might conflict with his plans. And again, the hope is there will be mutual accommodation.

The next item is the doctor will have the right to visit with the children frequently at times other than those outlined provided that the visitation does not conflict with important activities in which the children are involved.

The next, Mrs. Brown will allow either Dr. Brown or his present wife to pick up and return the children, but in the event that it's the current Mrs. Brown picking them up, that she will honk for the children and drive away. If the children do not come or she's notified when the children will be there within five minutes, then she'll have the right to go to the door and get that information.

We'll provide, relative to the life insurance on the children, that the three children will remain as beneficiaries on that policy so long as there's an obligation for support of any child. As soon as there's no obligation for support, then the obligation to maintain the policy will terminate.

That so long as the policy is in force, if any of the children are no longer supported, Mrs. Brown would have the right to notify Dr. Brown of her desire to elect that the policy have the names of the non-supported child removed from the policy so it enters the benefit of only the supported children.

The doctor will provide evidence that both of his life insurance policies are currently in force.

* * *

C E R T I F I C A T E

STATE OF UTAH §
§ ss.
COUNTY OF SALT LAKE §

I, Cecilee Gruendell, do hereby certify that I am a Certified Shorthand Reporter and Notary Public in the State of Utah; that as such Reporter I attended the hearing of the foregoing matter, and thereat reported in stenotype all the statements and proceedings had therein; that thereafter I caused to be transcribed my said stenographic notes into typewriting, and the foregoing pages numbered from 2 to 10, inclusive, constitute a full, true, and correct report of the same.

Dated at Salt Lake City, Utah, this 15th day of June, 1984.

Cecilee Gruendell
C.S.R. License No. 167

My commission expires:
March 10, 1986.

* * *

of any material fact, cannot change his relationship to the corporation and to appellants. The objection which appellants may urge to respondent's position is not that respondent wrongfully assigned the lease to Ansonia, but that he now contends that, because of such assignment, he is, from the date of the assignment, free from the obligation to pay rent

The court held the assignor was obligated to pay rent up until the time he divested himself of the ownership of the assignee's stock.

A uniquely comparable situation exists here. It is obvious the sole purpose of Gregory's assignment to the corporation was to escape his personal responsibility and liability under the lease. This clearly is precluded under National Bank of Commerce v Dunn, *supra*. The only distinguishing feature would be the $5,000 payment provision. Since the assignment is inoperative so long as defendant Gregory retains controlling interest in Gray Building, Inc there is no occasion for the defendant to pay the $5,000 pursuant to the lease provision. The fact that he paid the $5 000 does not make the assignment operative

Judgment is reversed and the case is remanded to the trial court to enter judgment in accordance with this opinion

EVANS and GREEN, JJ, concur

6 Wash App 587

Helen R BAIRD Appellant

v

Alexander BAIRD, Respondent.

No. 1067-1.

Court of Appeals of Washington, Division 1, Panel One

March 20 1972.

Divorced wife moved to vacate decree as it pertained to division of property The Superior Court King County B J McLean J, denied motion and plaintiff appealed The Court of Appeals, Callow, J, held that evidence supported finding that stipulation concerning property had been entered into with understanding of parties

Affirmed.

1. Stipulations ⇨6, 7

Stipulation is binding on parties if it is arrived at pursuant to rule requiring agreement between parties to be made and consented to in open court before court reporter and statute granting attorney authority to bind his client by his agreement duly made, but providing that court should disregard stipulation unless it is made in open court or signed by party against whom it is sought to be enforced or his attorney RCWA 2.44.010, CR 2A.

2. Appeal and Error ⇨125

Only if fraud, mistake, misunderstanding or lack of jurisdiction is shown will a judgment by consent be reviewed on appeal. RCW 2.44.010, CR 2A

3. Stipulations ⇨5

With respect to stipulation, function of trial court is to ascertain that parties and counsel understand it and to implement it RCW 2.44.010, CR 2A.

4. Stipulations ⇨13

A trial court's decision that a stipulation was entered into with understanding and agreement of parties will not be disturbed where it is supported by evidence RCW 2.44.010 CR 2A

5. Stipulations ⇨13

A trial court has discretion to relieve a party from a stipulation when it is shown that relief is necessary to prevent injustice and that granting of relief will not place adverse party at disadvantage by having acted in reliance upon the stipulation RCW 2.44.010 CR 2A

6. Divorce ⇨249(2)

A stipulation disposing of property in a divorce case is subject to court approval. RCW 2.44.010, CR 2A

7. Divorce ⇨249(2)

Trial court's approval of stipulation disposing of property in divorce case will

not be disturbed unless there is a clear and manifest abuse of discretion. RCWA 2.-44.010; CR 2A.

8. Stipulations ⇨21

Evidence supported finding that stipulation concerning property had been entered into with understanding of parties

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Stern, Gayton, Neubauer & Brucker, Robert E. Prince, Seattle, for appellant.

K. David Lindner, Seattle, for respondent.

CALLOW, Judge.

In October 1968, the plaintiff wife filed suit for divorce and shortly thereafter the defendant husband filed an answer and counterclaim. There was a settlement conference in April 1970, which did not culminate in a written agreement, and the matter came on for trial in August 1970, with both parties represented by the counsel that had represented them since the commencement of the action. Counsel informed the court that attempts had been made at settlement without success, and the court inquired of the plaintiff if she would like additional time to attempt settlement. She agreed

Following a recess through the morning, counsel for plaintiff stated that an agreement had been reached, and he called the plaintiff to the stand She testified in part as follows

Q Have the two of you, Mrs Baird, arrived at a division of the property, both separate and community, that is satisfactory to you?

A I am sorry, I don't—still don't know what it is. I thought it was $80,000 and now I see the figure is $66,000, and I just don't—

Q Let me ask you the question: Under the terms of the settlement that we have worked out is Mr Baird to receive the apartment house that is referred to as the Frederick Apartment house?

A Yes.

Then followed questions and answers concerning the agreements regarding the dwelling house, certain securities and pension rights Then plaintiff was asked:

Q You want to receive from Mr. Baird $51,672 in cash, is that correct, with one exception, that from the $51,672 Mr. Baird, in order to have some cash on hand, will give you a 6% 18-month promissory note for $5,000 so that in effect rather than to get $51,672 in cash you will receive initially $46,672 plus the $5,000 note, is that correct?

A Yes. That's right.

After questioning immaterial to this appeal, the counsel further inquired.

Q And the $51,672 and the $18,000 totals $69,672 and the one-half interest in the house when it is sold would bring your share up virtually above $80,000?

A Yes

Q Now, Mr Baird is to, as I say, receive the Frederick Apartment house and that you would then execute to him a deed, quit claim you to him your interest in the apartment house?

A Yes

Q And Mr Baird would receive the stocks and bonds that are currently held by the two of you with a market value as of a day or so ago of $30,316?

A Uh-huh.

Q So that his share, based on an evaluation of the apartment of $42,000 net would bring his share also to $69,672 plus one-half interest in the house?

A Yes.

This is the essence of the recitation It reflects that the plaintiff understood the terms of the agreement. She retired from the stand without comment or objection. Findings of Fact, Conclusions of Law and a Decree of Divorce were entered on August 28, 1970, with both counsel present

and with plaintiff's counsel acknowledging receipt of copies on the documents

A motion to vacate the decree as it pertained to the division of properties was filed by newly retained counsel September 28, 1970 The plaintiff claimed the stipulation was a surprise and that she did not understand the proceedings

Plaintiff claims as error the denial of the motion to vacate as it pertained to the property settlement and failure to do substantial justice by allowing the stipulation to stand as it pertains to property rights

CR 2A regarding stipulations requires an agreement between parties to be made and consented to in open court before a court reporter RCW 2 44 010 grants an attorney authority to bind his client by his agreement duly made but states in part, that the court shall disregard a stipulation unless it is made in open court or signed by the party against whom the same is alleged or his attorney

[1 2] A stipulation arrived at in this manner is binding on the parties Cook v Vennigerholz 44 Wash 2d 612 269 P 2d 824 1954) Only if fraud, mistake, misunderstanding or lack of jurisdiction is shown will a judgment by consent be reviewed on appeal Washington Asphalt Co v Harold Kaeser Co, 51 Wash 2d 89 316 P 2d 126 (1957)

[3] The function of the trial court is to ascertain that the parties and counsel understand the stipulation Jones v Jones 23 Wash 2d 637, 161 P 2d 890 (1945), and to implement that agreement

[4] A trial court s decision that a stipulation was entered with the understanding and agreement of the parties will not be disturbed where it is supported by the evidence In Deer v Deer 29 Wash 2d 202 186 P 2d 619 (1947) the court reviewed the record concerning an order denying modification of a property settlement reached by stipulation and refused to interfere with the trial court s decision that the stipulation was understood by the parties Halvorsen v Halvorsen, 3 Wash App 827 479 P 2d 161 (1970) was concerned with whether a plaintiff wife was mentally capable of making a knowing decision regarding property rights The trial court was upheld in its finding that plaintiff had adequate representation and was capable of making a knowing decision Substantial evidence was in the record to support such a finding, and the party was bound by her action

[5] A trial court has discretion to relieve a party from a stipulation when it is shown that relief is necessary to prevent injustice and the granting of the relief will not place the adverse party at a disadvantage by having acted in reliance upon the stipulation State v Wehinger 182 Wash 360 47 P 2d 35 (1935) Stevenson v Hazard, 152 Wash 104, 277 P 450 (1927)

In Schmidt v Schmidt, 40 Wis 2d 649 162 N W 2d 618 (1968), it was apparent from the record that the parties and their attorneys discussed at length with the trial judge the value of the property involved The finding that the parties stipulated and agreed on the value of the properties and the property settlement was upheld The court stated in part as follows at 621

> Stipulations in divorce actions are in the nature of a contract [citations omitted] And oral stipulations made in open court during trial taken down by the reporter and acted upon by the parties and the court are valid and binding [citations omitted] The discretion of the trial court to relieve parties from stipulations when improvident or induced by fraud misunderstanding or mistake or rendered inequitable by the development of a new situation is a legal discretion to be exercised in the promotion of justice and equity and there must be a plain case of fraud misunderstanding or mistake to justify relief [citation omitted]

[6 7] A stipulation disposing of property in a divorce case is subject to court approval Munroe v Munroe 27 Wash 2d 556 178 P 2d 983 (1947) and such approval of a property division will not be dis

turbed unless there is a clear and manifest abuse of discretion. Mayo v. Mayo, 75 Wash.2d 36, 448 P.2d 926 (1968); State ex rel. Gould v. Superior Court, 151 Wash. 413, 276 P. 98 (1929); Lynn v. Lynn, 4 Wash.App. 171, 480 P.2d 789 (1971); Rehak v. Rehak, 1 Wash.App. 963, 465 P.2d 687 (1970).

[8] The record reflects sufficient evidence to support the finding that the stipulation concerning the property was entered with the understanding of the parties. An examination of the record also discloses that the trial court did not abuse its discretion by initially and ultimately approving the disposition of the property.

The judgment is affirmed.

WILLIAMS and JAMES, JJ., concur.

Tommy J. CARTWRIGHT, James F. Murphy, and Stephen A. Little, Co-Administrators of the Estate of Ira L. Lauderdale Deceased, Appellees,

v.

ATLAS CHEMICAL INDUSTRIES, INC., a Foreign Corporation, Appellant.

No. 50527.

Court of Appeals of Oklahoma, Division No. 1.

April 18, 1978.

Rehearing Denied May 23, 1978.

Certiorari Denied March 19, 1979.

Released for Publication by Order of Court of Appeals March 22, 1979

Coadministrators of estate of worker who was fatally injured in explosion brought action against manufacturer of blasting caps alleging survival cause of action for benefit of estate seeking damages for pain and suffering and reimbursement of medical expenses and wrongful death action The District Court, Creek County, Charles S. Woodson, J., entered judgment in favor of coadministrators on jury verdict, and manufacturer appealed. The Court of Appeals, Box, P. J., held that (1) evidence was sufficient to establish prima facie case of manufacturer's product liability, (2) manufacturer failed to properly preserve objections that hypothetical questions asked by coadministrators contained facts not in evidence, (3) court did not abuse discretion in qualification of witnesses as experts in explosives and packaging; (4) statement of worker to attending physician concerning accident was properly admitted under res gestae exception to hearsay rule, (5) where pathologist testified concerning autopsy findings insofar as they bore upon life expectancy of worker, refusal to admit autopsy report was not error; (6) refusal to allow withdrawal of stipulation by manufacturer was not abuse of discretion, (7) award of $50,000 for pain and suffering was supported by evidence and was not induced by bias or prejudice of jury; (8) award of $200,000 to widow for pecuniary losses and loss of services was not excessive; (9) evidence was sufficient to establish that worker contributed money, aid and services of pecuniary value to daughters for purposes of supporting award to daughters, and (10) prejudgment interest was properly awarded on amounts recovered under survivorship and wrongful death causes of action.

Affirmed.

1. Explosives ⇐12

In order to establish prima facie case of manufacturer's products liability, plaintiffs must prove: (1) that product was cause of injury, (2) that defect existed in product at time it left possession and control of manufacturer, and (3) that defect made product unreasonably dangerous to user or his property

2. Explosives ⇐12

In action against manufacturer of blasting caps for death of individual who allegedly dropped box of caps, evidence was sufficient to establish prima facie case of manufacturer's products liability in that inferences could be drawn that product as packaged made it unreasonably dangerous to user and product was cause of injury.

3. Trial ⇐178

In determining whether evidence is sufficient to establish prima facie case of manufacturer's product liability, evidence must be viewed in light most favorable to plaintiffs and all evidence tending to derogate plaintiffs' position must be disregarded.

4. Products Liability ⇐82

Circumstantial evidence may be relied upon in manufacturer's product liability case.

5. Trial ⇐139.1(7)

Motion for directed verdict should not be sustained unless there is entire absence of proof showing plaintiff's right to recovery

6. Explosives ⇐12

Where evidence of both sides in products liability action against manufacturer of blasting caps was conflicting, it was function of jury to determine rights and liabilities of parties

7. Appeal and Error ⇐1001(1)

Where there was competent evidence which reasonably tended to support jury verdict against manufacturer of blasting caps in products liability action, verdict would not be disturbed on appeal

8. Evidence ⇐553(4)

Hypothetical questions must be based upon facts as to which there is such evidence that jury might reasonably find that such facts are established.

9. Evidence ⇐553(2)

Only omission of material facts which are essential to formation of intelligent opinion on matter will be fatal to hypothetical question.

10. Appeal and Error ⇐231(6)

To preserve error on appeal, opposing counsel must specifically object that hypothetical question includes facts not in evidence, or error, if any, cannot be raised on appeal; such objection should point out the facts improperly included or omitted.

11. Appeal and Error ⇐206(2)

Objection that hypothetical question omitted material data cannot be raised for first time on appeal

12. Appeal and Error ⇐231(6)

Where manufacturer's objections went to expertise of four witnesses or were merely general objections, manufacturer failed to properly preserve objections that hypothetical questions asked of witnesses contained facts not in evidence in products liability action against manufacturer of blasting caps

13. Evidence ⇐546

Question of whether witness is sufficiently qualified to testify as expert is preliminary question to be determined by trial court and qualification of witness is expert is matter addressed to sound discretion of the court

14. Evidence ⇐542

As expert in field of chemical engineering, witness could properly give his opinion as to chemical reactions of three explosives contained within blasting cap for purposes of products liability action against manufacturer of blasting cap

15. Evidence ⇐542

Ruling that witness was unqualified to give opinion as to exact amount of impact necessary to cause detonation of blasting cap did not mean that witness, who was chemist familiar with explosives, could not express opinion that detonation could occur given sufficient quantity of impact.

16. Evidence ⇐536

Where packaging engineers were sufficiently qualified to testify regarding custom packaging, engineers could give opinion as to packaging of blasting caps, notwithstanding that neither engineer had packaged explosives

17. Evidence ⇐128

Where worker was subjected to violent explosion which tore both his lower legs from his body as well as causing other severe injuries, worker was conscious at all times, was in severe pain and was within hours of his death, statement by worker to physician concerning accident was spontaneous, not deliberative, and was provoked or influenced by happening of accident so as to become a part thereof, thus, doctor's testimony concerning worker's statement was admissible under res gestae exception to hearsay rule

18. Evidence ⇐123(1)

Time span between event and declarant's later expressions is simply element for consideration, but is not controlling, in determining whether expressions are admissible under res gestae exception to hearsay rule

19. Evidence ⇐118

Admissibility of statements under res gestae exception to hearsay rule is largely determined by facts and circumstances of

each case and should be left to discretion of trial court.

20. Evidence ⇐333(1)

In light of statements in autopsy report which were outside expertise of pathologist who performed autopsy, which were not probative on issue which they were offered to show, or which were speculative, autopsy report was not admissible in its entirety in products liability action against manufacturer of blasting caps where report was offered by manufacturer to show that worker who was killed in explosion was suffering from disease processes which would have shortened his normal life expectancy.

21. Trial ⇐48

If document contains evidence which is inadmissible, party offering document may omit the inadmissible part and offer those portions which are admissible.

22. Evidence ⇐333(1)

Where pathologist testified concerning autopsy findings insofar as such findings bore upon life expectancy of worker killed in explosion, refusal to admit autopsy report in evidence to show that worker suffered from conditions which would have materially shortened his work and life expectancies was not error in products liability action against manufacturer of blasting caps.

23. Stipulations ⇐12

Standards for allowing withdrawal of stipulation are: (1) clear showing that fact stipulated to is untrue; (2) motion to withdraw must be timely made; (3) good cause must be shown for relief; (4) stipulated fact must be one of material character which changes rights of parties; (5) opposing party must not have detrimentally relied and changed his position; (6) failure to allow stipulation will result in injustice to one of parties, and (7) whether court abused discretion.

24. Stipulations ⇐13

There are no grounds for relief from stipulation if lack of knowledge is due to failure to exercise due diligence.

25. Stipulations ⇐12

Where motion by manufacturer in products liability action to withdraw stipulation was not timely, fact of whether manufacturer did or did not manufacture blasting caps could have been ascertained with due diligence prior to stipulation, and plaintiffs detrimentally relied on stipulation, court did not abuse discretion in refusing to allow manufacturer to withdraw stipulation that manufacturer was engaged in business of manufacturing, packaging and selling blasting fuse caps.

26. Appeal and Error ⇐999(1)

Verdicts will not be interfered with by appellate court if issues have been fairly submitted under proper instructions.

27. Appeal and Error ⇐1004.1(1, 4)

Reviewing court has no right to place limitations on amount of damages returned by jury unless it is convinced amount of recovery bears no relation whatever to evidence, or that it was induced by bias or prejudice on part of the jury.

28. Damages ⇐96

Compensation for pain and suffering rests in sound discretion of jury as there is no market where pain and suffering are bought and sold, nor any standard by which compensation for it can be definitely ascertained, or the amount actually endured determined.

29. Death ⇐97

Where injuries sustained by worker due to explosion included multiple blast wounds to the face, chest and abdomen, both of his lower legs were blown away, his right hand was gone with near amputation of his left hand and both eyes were severely injured, worker was conscious during ambulance ride, and physician could not give worker adequate pain medication, award of $50,000 for pain and suffering was adequately supported by evidence and not induced by bias or prejudice on part of jury.

30. Death ⇐99(4)

Award of $200,000 to widow for pecuniary loss and loss of services resulting from

death of husband was not excessive where widow was 56 years of age, had been married to husband 32 and one-half years and before he retired husband would have earned approximately $60,000

31. Death ⇐95(3)

Adult children can recover in wrongful death action for death of father, for such purposes, correct measure of damages is pecuniary loss suffered by reason of death of father.

32. Death ⇐77

Evidence was sufficient to establish that father had contributed money, aid and services with pecuniary value to adult daughters for purposes of recovery by daughters in action for wrongful death of father

33. Appeal and Error ⇐1004.1(1)

On appeal, matter is not whether appellate court would have reached different conclusion as to amount of damages suffered, only question which is presented on appeal is whether there is competent evidence to sustain verdict

34. Appeal and Error ⇐1004.1(8)

Where jury was properly instructed as to measure of damages, there was competent evidence reasonably tending to support verdict and it did not appear that jury was swayed with passion or prejudice verdict in wrongful death action would not be disturbed on appeal

35. Trial ⇐116

Rule that use of blackboards during closing argument is matter within discretion of trial court applies whether counsel places figures on blackboard prior to or during argument to jury

36. Trial ⇐116

Use of blackboard containing damage analysis as aid during closing argument by coadministrators of decedent's estate was not abuse of discretion in products liability action

37. Interest ⇐39(2)

Since causes of action for personal injuries survives death of injured party, prejudgment interest awarded when verdict for damages by reason of personal injuries is accepted is properly allowable in survival action 12 O S 1971, §§ 727, 1051.

38. Death ⇐104(6)
Interest ⇐39(2)

Prejudgment interest was not required to be included in jury instructions and merged in final verdict in survival cause of action for benefit of estate seeking damages for pain and suffering, statute governing such prejudgment interest specifically required court to add interest onto the verdict 12 O S 1971, §§ 727, 1051.

39. Interest ⇐39(2)

Statute governing prejudgment interest allows interest if verdict is returned for damages by reason of personal injuries, thus, language of statute is broad enough to include recovery of prejudgment interest for wrongful death by reason of personal injuries if action is brought by someone other than person who sustained injuries. 12 O S 1971, §§ 727, 1053

Appeal from the District Court of Creek County, Charles S Woodson, Judge

AFFIRMED

Jack B Sellers Law Associates, Inc by Jack B Sellers, Sapulpa, for appellees

Dan A Rogers, W Michael Hill, Tulsa, for appellant

BOX Presiding Judge

An appeal by Atlas Chemical Industries, Inc (Atlas), defendant in the trial court, from a manufacturers product liability case Plaintiffs-appellees are the co-administrators of the estate of Ira L Lauderdale, deceased, who brought a survival cause of action for the benefit of the estate seeking damages for pain and suffering and reimbursement for medical expenditures and a wrongful death action for the pecuniary loss suffered by the beneficiaries by reason of the death of decedent The beneficiaries consist of the widow and two adult daughters

Decedent was a sixty-one year old welder who was employed by Cimarron Pipeline Company (Cimarron). On September 8, 1971, decedent was in the process of moving dynamite fuse caps when he allegedly dropped a partially filled container causing one or more of the caps to explode which, in turn, caused detonation of the remaining caps. Decedent died as a result of injuries sustained in the explosion. The caps involved in the explosion were allegedly manufactured by Atlas. Plaintiffs brought both the wrongful death and survivorship causes of action based upon manufacturers' product liability. Plaintiffs' main contention was that Atlas caps were high explosives capable of detonation when subjected to impact force. Given this susceptibility, the packaging of the caps was defective inasmuch as the caps were not cushioned from one another and would strike against each other if dropped which made the product unreasonably dangerous to the consumer.

Plaintiffs initially sued American Cyanamid Company (American Cyanamid) and Deupree Distributing Co., Inc. (Deupree) as co-defendants. However, plaintiffs dismissed their causes of action against these defendants without prejudice.

Upon submission of the case to the jury, a verdict was returned in favor of plaintiffs in the total amount of $272,045.28. On appeal, Atlas asserts nine propositions of error which will be discussed under separate headings. This court commends the parties for the excellent briefs provided.

I. Sufficiency of the Evidence

Atlas' first contention is that plaintiffs failed to establish a prima facie case inasmuch as the evidence failed to establish a defect existed or that the defect caused the accident and the trial court erred in refusing to direct a verdict in favor of Atlas.

[1] In order to establish a prima facie case in manufacturers' products liability under *Kirkland v. General Motors Corp.*, Okl., 521 P.2d 1353, plaintiffs must prove (1) that the product was the cause of the injury, (2) that the defect existed in the product at the time it left the possession and control of the manufacturer; and (3) that the defect made the product unreasonably dangerous to the user or his property. Unreasonably dangerous is defined at pages 1362–63 of *Kirkland*, as follows:

> "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

Plaintiffs contend that the defect existed in the packaging of the dynamite caps.

The parties entered into numerous stipulations, all of which are not necessary to enumerate at this time. Stipulations 8 and 9 read as follows:

> 8. That it was intended by Atlas in the manufacture and packaging and sale and distribution of the caps it made during the time material to this case that the caps would reach the ultimate user or consumer in the same and unchanged condition was made and packaged by them.
>
> 9. That it is agreed in this case such Atlas caps as were sold to Cimarron Pipeline by Deupree, or if any, from American Cyanamid, were delivered to Cimarron in the same condition as when manufactured, packaged and sold by Atlas.

These two stipulations were sufficient to establish element number two of plaintiffs' prima facie case. Thus, plaintiffs had only to prove a defect existed in the product which caused the injury and the defect made the product unreasonably dangerous to the user.

The parties further stipulated that it was foreseeable to Atlas that dynamite caps might be dropped by the user from heights of four feet and that Atlas had the control and discretion of choice of packaging materials, subject to governmental regulations, if any.

In order to rule on Atlas' first contention, it becomes necessary to summarize the evidence presented by the parties. The transcript of evidence encompasses 687 pages.

For this reason, the summary is not meant to include a detailed account of each witness' testimony. The objections to various portions of plaintiffs' evidence will be discussed under separate headings.

Plaintiffs' first witness was Lawson Dan Glenn, a welder for Cimarron, who was working with decedent on the date of the explosion, September 8, 1971, between 7:30 and 8:00 A.M. Mr. Glenn and decedent went to the shed to put protective covers over the locks of the storage magazine. They took no welding equipment in the shed and nothing was present which could have produced a spark. In order to put the protective covers over the locks of the magazine, it was necessary to move the dynamite caps that were located therein. There were two full cartons of caps plus one partially filled carton with loose caps without a lid (referred to as a tray). Mr. Glenn removed the first full box and handed it to decedent. Decedent carried the box and set it on the floor, 15 or 20 feet from the magazine. Mr. Glenn reached to remove the second full box while decedent was in the process of setting the first upon the floor. The same procedure was followed for the second full box of caps. The third box was a partial carton with several boxes removed so the remainder were loose. Mr. Glenn handed decedent the partially opened carton who proceeded to carry the box to set it on the floor. Mr Glenn squatted down in front of the magazine to measure the lock and then decedent said "Dan" in a normal voice. Mr. Glenn raised and turned toward decedent but all he saw was the blast.

Clovis Dale Hester, president of Cimarron, testified he bought all his caps from Deupree and all the caps were stored in the magazine.

Willis Dyer, Jr. was the office manager for Cimarron for eighteen years and had custody and control over the magazine box. Mr. Dyer testified that the magazine contained two cartons and one tray The last 6,000 caps purchased by Cimarron came from Deupree and Cimarron never purchased elsewhere. No other brand besides Atlas caps was in the magazine. The morning of the accident, Mr. Dyer had put the tray back in the magazine. The tray was partially filled with Atlas caps, some caps had been removed and a rag had been placed around it.

Willis Cummisky was the magazine keeper and manager for Deupree, an explosive distributor. After June, 1965, Deupree only received Atlas fuse caps and the oldest were sold first.

Joseph E. Deupree testified during plaintiffs' rebuttal. Mr. Deupree was associated with Deupree and supervised the record keeping. Since 1965, Deupree delivered only Atlas Number 6 caps and had never sold Dupont fuse caps.

Dr. John D. Hesson treated decedent in the emergency room. Dr. Hesson asked decedent what happened and "he was moving some dynamite caps and he thought he may have dropped them, and he said they exploded."

Plaintiffs called as their first expert witness Robert J. Grubb, chief chemist of the Warner Plant of American Cyanamid Company who was familiar with the general types of explosives manufactured in the United States. Two chemicals contained within the Atlas caps are HNM (Hexanitromannite) and Diazo (Diazodinitrophenyl) and both were considered by Mr. Grubb as high explosives. He stated that impact or shock energy of sufficient quantity can detonate these explosives. There is a level of impact above which all caps will detonate and below which none will. There is also a level of impact where some caps will detonate and others will not. On cross-examination, it was determined Mr. Grubb was not qualified to testify on the exact amount of force necessary to detonate a cap inasmuch as he had never performed drop tests on Atlas caps. If one cap in an Atlas tray, containing 100 caps, exploded there is a very high probability they all would detonate. In the explosion, the metal contained in the shed would be torn into shrapnel and thrown at high velocity. The presence of grit or impurities in the cap increases its sensitivity Mr Grubb's opinion was that

caps that were afforded no cushion from one another with grit present in the caps and dropped four feet would be unreasonably dangerous to the consumer.

Robert E. Fearon, a chemical engineer educated in the fields of physics, chemistry and mathematics who has detonated and dissected caps to examine and analyze them, was called as plaintiffs' second expert witness. Atlas caps contain PETN (Pentaerythitol Tetranitrate), a very powerful and quite sensitive explosive. Mr. Fearon considers PETN more sensitive than nitroglycerin as to impact. Impurities which make PETN more sensitive are grit and void spaces filled with air. If PETN was dropped four feet onto the floor with a bubble of air contained therein and there was no cushioning, Mr. Fearon felt one of the caps might get hurt and explode. It was his opinion that there is a probability of any high explosive exploding if it suffers an impact. Mr. Fearon testified HNM was a high explosive, quite sensitive to shock and very dangerous to put any impact on.

According to Mr. Fearon, time, temperature and relative humidity are the things that do harm to explosives, such as being placed for a long time in a warm place with high humidity In Oklahoma, there would be some damage after a long period of storage. Assuming the Atlas caps had been stored in the shed at Cimarron for fifteen months up to two years, Mr. Fearon's opinion was that when the caps were dropped, one exceeded its toleration limit. The fact that the caps were not cushioned from one another made Mr. Fearon feel they were unreasonably dangerous to the consumer. Mr. Fearon also expressed the following opinion:

> It is my opinion that the provision of metallic contact, that is, the contact of these metal cases with one another is an unnecessary invitation to a hard jolt because metal is striking on metal if anything happens, and it's also—that relates to the manner of packaging. And it's also my opinion that there could have been within the statistics of the manufacturer some variation that would result and probably did result in some of the caps being much more sensitive than the other ones were.

Mr. Fearon has never been employed by a manufacturer of explosives and had disassembled an electric cap containing lead azide which is more dangerous than an Atlas fuse cap which does not contain lead azide.

Robert E. Hebert, a packaging engineer, was called as an expert for plaintiffs. In response to a hypothetical question, Mr. Hebert testified that a proper package for caps sensitive to impact would be to restrict the movement in the container of the individual blasting caps and then to cushion them from impact from one another. Barrier bags could prevent exposure to moisture and air. Materials such as molded styrofoam or slotted chipboard for partitions could be used as cushioning at a very minimal cost to the manufacturer. Mr. Hebert felt it was quite feasible from an engineering and economic standpoint to package caps to absorb the shock of a four foot drop in both the primary and intermediate container. Mr Hebert stated the package used by Atlas provided no protection on the interior; the caps are not protected on impact from one another. If one cap is removed, the remaining caps roll about knocking against each other. The exterior box is thin chipboard which will transmit impact to the caps inside providing very little cushioning. Because the caps could move about, they would hit on the more susceptible part to explosion if dropped (the heavier end). Military specifications call for paperboard partitioning the caps with the box placed in a barrier bag.

Ralph Lash has been a packaging engineer for thirty years. He testified to the use of rolls of polyethylene (plastic) to cushion caps from one another at a cost of two-tenths of a cent to separate a hundred fuse caps. (The packaging would be similar to that of Contact Cold Capsules.) Mr. Lash also prepared a package made of corrugated chipboard so the caps could not strike each other if dropped. Mr Lash's opinion was the package used by Atlas had no cushioning value whatsoever.

Atlas called as its first defense witness Anna K. Orlosky, who works on the cap line at Atlas Ms Orlosky's job is to rumble the caps The caps are placed in the rumbler bag which cleans the excess powder off the shells with damp sawdust Ms Orlosky does position herself behind bullet proof glass and wears special clothing to rumble There is only a visual inspection without any optical aids to determine if there are any bad caps or if the caps are clean, no powder or foreign bodies remaining on the caps.

Arthur Boman, a research chemist for Atlas, testified that several months exposure to high humidity and temperature desensitizes the caps, they become less likely to explode Mr Boman had performed drop tests from thirty feet on Atlas caps and had also placed the caps on a steel anvil and dropped a ten pound weight upon them No explosion resulted in either case

Paul Miller is the Director of Governmental Affairs for Atlas He testified the reason for the military specifications was because the caps were dropped by paracnute and there was need for more protection during clandestine work behind enemy lines Mr Miller stated the use of plastic in packaging as testified to by Mr Lash was incorrect The plastic generates or stores static electricity which represents a hazard to explosives Mr Miller did not believe it was possible to drop Atlas caps four feet and have them detonate On cross-examination, Mr Miller stated that before the caps leave the plant they are cushioned from shock through the use of two inches of sawdust between the intermediate carton and outside shipping carton

George Keenum, the area manager for Atlas, searched the scene of the accident the day after the explosion and found several unexploded caps Atlas caps have a round bottom Some of the caps found had indentations on the bottom and were one-eighth inch shorter than Atlas caps They were shown to be Dupont, not Atlas caps upon X-Ray However in his deposition, Mr Keenum stated the caps he found were the general color size and appearance sold by Atlas It was stipulated Mr Burnett would have testified he investigated the accident and he found unexploded caps and gave them to Mr Keenum, but he did not and was not asked to mark them

Melvin A Cook, a consultant in the field of explosives, was called as an expert witness for Atlas It was his opinion caps are not affected by the temperature in Oklahoma High humidity and moisture make the caps less sensitive Caps are most sensitive when brand new and do not become more sensitive in normal use Mr Cook expressed the opinion that caps dropped four feet in a partially filled box would not detonate

[2–4] Although the evidence presented by the parties was conflicting, this court believes the evidence offered by plaintiffs was sufficient to establish a prima facie case in manufacturer s product liability In passing upon this contention, the evidence must be viewed in the light most favorable to the plaintiffs and all evidence tending to derogate plaintiffs' position must be disregarded *Jackson v Cushing Coca-Cola Bottling Co*, Okl, 445 P 2d 797, *Wilson v Chicago, Rock Island & Pacific R R Co*, Okl, 429 P 2d 763 Taken in the light most favorable to plaintiffs, the evidence tended to show that caps manufactured by Atlas, not Dupont, caused the explosion and that Atlas caps were a combination of high explosives that could be detonated by impact force Atlas voluntarily packaged the caps in such a way that the caps in the intermediate package would strike against one another after one cap had been removed if dropped from four feet Plaintiffs experts testified the packaging was defective in that it did not protect the caps from external trauma when proper packaging was readily available and feasible from an engineering and cost standpoint While moving a partially filled carton, decedent dropped the caps which the parties stipulated was foreseeable When dropped, the caps exploded Proper inferences could be drawn that the product is packaged made it unreasonably dangerous to the consumer and the product was he cause of the injury

Circumstantial evidence may be relied upon by plaintiffs in a manufacturers' product liability case The Supreme Court in *Kirkland,* supra at 1355, held:

> Syllabus by the Court.
>
> 5. The plaintiff may prove his cause of action in Manufacturers' Products Liability by circumstantial evidence and proper inferences drawn therefrom, since actual or absolute proof of the defect in a sophisticated product may be within the peculiar knowledge or possession of the defendant.

See also *Sadler v T. J. Hughes Lumber Co, Inc.,* Okl.App., 537 P 2d 454; see generally *Highway Const. Co. v Shue,* 173 Okl. 456, 49 P 2d 203. This court holds plaintiffs' proof, along with Stipulations 8 and 9, was sufficient to establish a prima facie case in manufacturers' products liability.

[5–7] Atlas also contends the trial court should have directed a verdict in its behalf We disagree. A motion for directed verdict should not be sustained unless there is an entire absence of proof showing plaintiffs' right to recover *Sadler v T J Hughes Lumber Co, Inc,* supra, citing *Austin v Wilkerson, Inc,* Okl, 519 P 2d 899 Furthermore, the evidence of both sides to this controversy was conflicting and it is the function of the jury under these circumstances to determine the rights and liabilities of the parties There being competent evidence which reasonably tends to support the jury verdict for plaintiffs, the verdict will not be disturbed on appeal *Sunray DX Oil Co v Brown,* Okl., 477 P 2d 67, *Miller Construction Co v Wenthold,* Okl, 458 P 2d 637

II Hypothetical Questions Based on Facts Not in Evidence

In proof of their case, plaintiffs utilized four expert witnesses Atlas contends reversible error was created by allowing plaintiffs' experts to answer hypothetical questions based on facts unsupported by the evidence

[8–11] Hypothetical questions must be based upon facts as to which there is such evidence that a jury might reasonably find that they are established *Goodlett v Williamston,* 179 Okl 238, 65 P 2d 472. Only the omission of material facts which are essential to the formation of an intelligent opinion on the matter will be fatal to a hypothetical question *K P Construction Co v Death of Parrent,* Okl., 562 P 2d 501; *In the Matter of the Death of Deere,* Okl., 557 P 2d 891. However, to preserve the error on appeal, the opposing counsel must specifically object that the question includes facts not in evidence or the error, if any, cannot be raised on appeal. This rule is well stated in 31 Am Jur 2d Expert and Opinion Evidence, § 64 p. 572–73 (1967), as follows.

> In objecting to a hypothetical question, counsel must be reasonably specific as to the grounds of the objection. Thus, if counsel relies upon the point that the question invades the province of the jury, his objection should call the trial court's attention to such point, a mere general objection to the question, in which there is no intimation that counsel regarded the question as an invasion of the province of the jury, will not suffice *An objection made on the ground that the question includes facts not in evidence should point out the facts improperly included or omitted* The purpose of requiring counsel to specify grounds of objection to a hypothetical question is not only to assist the court in ruling on the objection, but also to enable opposing counsel to eliminate objectionable parts or characteristics of the question by changing its form or content.
>
> * * * * * *
>
> *In accordance with the general principle of appellate review, an objection that a hypothetical question omitted material data cannot be raised for the first time on appeal* (Emphasis added Footnotes omitted)

See also 12 O S 1971, § 424, *Davis v Town of Cashion,* Okl, 562 P 2d 854, *Cook v Sheffield,* 181 Okl. 635, 75 P 2d 1101, *Wor-*

rell v. Allen, 93 Okl. 3, 219 P. 367; *Fender v. Segro*, 41 Okl. 318, 137 P. 103.

[12] Rather than give a detail account of the numerous and lengthy hypothetical questions and objections thereto, suffice it to say Atlas' objections went to the expertise of the four witnesses or were merely general objections. In making his general objections, counsel for Atlas, Mr. Rogers, usually used the phrase "Note my (our) objection" with no grounds for the objection recited.

In regard to the expert witness, Robert E. Hebert, proceedings were held at the bench outside the presence of the jury at which time Mr. Rogers objected that Mr. Hebert was not an expert in packaging explosives and should not be allowed to give his opinion on the matter. This objection was overruled. Thereafter, Mr. Rogers objected after a hypothetical question was asked stating:

> Note my objection, Your Honor. . . . I won't be required to give my reason as long as I make my objection; is that sufficient, Your Honor. . . . I want to be sure I save the record.
>
> It's agreed *I don't have to give my reason, counsel knows what they are.* (Emphasis added.)

It was agreed to by both parties and the trial judge. However, from reading the transcript, it is apparent this was an extension of the objection of the expertise of Mr. Hebert and was not an objection to the hypothetical question containing facts not in evidence. On the next page of the transcript appears the following language:

> [H]ave I saved my objection as to the opinions of this person as an expert in this field of packaging dynamite caps? It is agreed I have saved my record?
>
> MR. SELLERS: I have so agreed for this particular witness *and this particular inquiry.* (Emphasis added.)
>
> THE COURT: All right.

A proper objection was entered as to one hypothetical question asked of Mr. Hebert; however, this particular question was not complained of in Atlas' brief as containing facts not in evidence. Mr. Rogers requested and was allowed a running objection to the expertise of Mr. Ralph Lash. No other objection was made other than "Note my objection."

Atlas failed to properly preserve its objections that the hypothetical questions asked by plaintiffs contained facts not in evidence. Thus, Atlas' second proposition of error is without merit.

III. Qualifications of Expert Witnesses

[13] Plaintiffs presented four expert witnesses: Messrs. Grubb, Fearon, Hebert and Lash. Atlas contends these witnesses were not qualified to express the opinions elicited during their examination and as a result Atlas should be granted a new trial under *Magnolia Petroleum Co. v. Norton*, 189 Okl. 252, 116 P.2d 893. The question whether a witness is sufficiently qualified to testify as an expert is a preliminary question to be determined by the trial court and the qualification of a witness as an expert is a matter addressed to the sound discretion of the trial court. *Gold Kist Peanut Growers Ass'n v. Waldman*, Okl., 377 P.2d 807. The Supreme Court in *City of Holdenville v. Griggs*, Okl., 411 P.2d 521, 525, stated:

> In *Arkansas Louisiana Gas Co. v. Maggi*, Okl., 409 P.2d 369, this Court said: "*Qualification of expert witness* is addressed to sound discretion of trial court whose ruling that a witness is sufficiently qualified *will not be disturbed on appeal unless it clearly appears that the discretion has been abused.*" (Emphasis added.)

See also *Continental Oil Co. v. Ryan*, Okl., 392 P.2d 492, citing *Tuck v. Buller*, Okl., 311 P.2d 212. We find no abuse of discretion by the trial court.

[14] Atlas contends Mr. Fearon was not qualified to testify in regard to fuse caps because he had disassembled an electric cap containing lead azide which is more dangerous than Atlas caps. There are similarities between the two forms of explosives and as an expert in the field of chemical engineering, Mr. Fearon could properly give his

opinion as to the chemical reactions of the three explosives contained within an Atlas cap.

[15] Mr. Grubb testified impact could detonate an Atlas cap. The trial court ruled that he was not qualified to testify on the exact amount of force necessary to detonate a cap inasmuch as he had never performed drop tests on Atlas caps. Atlas contends that the trial court, having ruled the witness unqualified, clearly abused its discretion by not granting Atlas' motion to strike and allowing Mr. Grubb's opinion to stand. The trial court only ruled the witness was unqualified as to the exact amount of force necessary to cause detonation. This does not mean that a chemist familiar with explosives could not express an opinion that detonation could occur given sufficient quantity of impact even though he could not testify as to the exact amount of impact needed.

[16] Messrs. Hebert and Lash were packaging engineers and Atlas asserts both were not qualified because neither had packaged explosives. However, the evidence shows both men were sufficiently qualified to testify regarding custom packaging. As with all the experts presented by plaintiffs, the weaknesses, if any, in their qualifications were adequately tested by cross-examination and the value of their opinions determined by the jury. *Magnolia Petroleum Co. v. Norton*, supra; 31 Am. Jur.2d Expert and Opinion Evidence § 30 at p. 530 (1967).

The trial court did not abuse its discretion in the qualification of these witnesses as experts.

IV Res Gestae Exception

[17] Atlas next asserts error on the part of the trial court in overruling its objection to hearsay testimony given by Dr John D. Hesson, the attending physician when decedent was brought into the emergency room at Drumright Memorial Hospital. The testimony complained of reads as follows:

> So I asked him what happened, and *he was moving some dynamite caps and he thought he may have dropped them, and he said they exploded.* I asked was he standing close by and he said right in front of them when they went off . . . (Emphasis added.)

Atlas asserts the admission of this hearsay evidence is reversible error. Plaintiffs contend the hearsay testimony was admissible under the res gestae exception to the hearsay rule or as a declaration included within the medical history given by the decedent to his treating physician as an aid to diagnosis and treatment.

The Supreme Court in *Silver Seal Products Co. v. Owens*, Okl., 523 P.2d 1091, 1096, reaffirmed in *In re Death of Cleveland*, Okl., 531 P.2d 1396, 1399, defined the res gestae exception, as follows:

> In *Piggee* [*Sand Springs Ry. Co. v. Piggee*, 196 Okl. 136, 163 P.2d 545] we said statements are admissible as part of the res gestae: (1) when made at or near time of the occurrence; (2) when spontaneously made; (3) when provoked or influenced by happening of the accident itself so as to become a part thereof. The *Taylor* [*Henry Chevrolet Co. v. Taylor*, 188 Okl. 380, 108 P 2d 1024] case declared admission of res gestae statements was justified by spontaneous nature of the statement, which provides sufficient guarantee of trustworthiness to render declarations admissible in evidence. Also see, Wigmore on Evidence 2nd, § 1749, that spontaneous or instinctive utterance made under circumstances calculated to provide a degree of trustworthiness, derive some credit independently of the declaration. We are of the opinion the basis for decision in these cases correctly define principles which govern admissibility of res gestae statements.

See also *Smith v. Munger*, Okl.App., 532 P.2d 1202.

Under the facts of this case, Dr. Hesson's testimony was admissible under the res gestae exception. Decedent was subjected to a violent explosion which tore both his lower legs from his body as well as causing other severe injuries. He was removed by ambulance to the emergency room where the

statement was made to Dr Hesson Decedent was conscious at all times but in severe pain and within hours of his death This court holds the statement by decedent was spontaneous, not deliberative, and was provoked or influenced by the happening of the accident so as to become a part thereof The disturbing event in this case would so pervade the mental processes of the decedent that it would be unlikely the statement was made in a premeditated, calculating or self-serving sense

[18] The statement was not made at the time of the explosion, but sometime thereafter (The record is not clear as to the time lapse, however, decedent only survived for three hours after the accident and during this time he was transported to Tulsa where he died) The time span between the event and the declarant's later expressions is simply an element for consideration, but is not controlling *Sooner Construction Co v Brown*, Okl, 544 P 2d 500, *Sinclair Oil & Gas Co v Cheatwood*, Okl, 350 P 2d 944 In *Henry Chevrolet Co v Taylor* 188 Okl 380, 108 P 2d 1024, 1027, the Supreme Court stated

> It is sufficient to say that admission of such statements is justified by the spontaneous nature of the statement which is in itself a sufficient guarantee of the trustworthiness of such declarations to render them admissible, if they are made under the immediate influence of the occurrence to which they relate, and it is not necessary that the declarations be so strictly contemporaneous with the occurrence to which they relate as to be admissible under the so-called 'verbal act' doctrine *the element of time being important only for the purpose of determining whether the declaration was made when the speaker was under the stress of nervous excitement as a result of the occurrence to the extent that the reflective faculties were stilled and the utterance therefore a sincere expression of his actual impressions and belief* (Emphasis added Citations omitted)

See also *Sand Springs Ry Co v Piggee*, 196 Okl 136, 163 P 2d 545

[19] Decedent's statement falls within the purview of the *Taylor* case Furthermore, the admissibility of such statements is largely determined by the facts and circumstances of each case and should be left to the discretion of the trial court *Indian Oil Tool Co v Thompson*, Okl, 405 P 2d 104, *Wray v Garrett*, 185 Okl 138, 90 P 2d 1050 We find no abuse of discretion on the part of the trial court in admitting the statement

Inasmuch as the statement made by decedent to Dr Hesson was properly admissible under the res gestae exception we need not determine whether the statement would fall within the medical history exception

V Admissibility of Autopsy Report

[20] Dr Leo Lowbeer, the pathologist who performed the autopsy upon decedent, was called to the stand by Atlas to testify decedent was suffering from disease processes at the time of the accident which would have shortened his normal life expectancy After Dr Lowbeer testified, Atlas moved to have the autopsy report admitted into evidence The trial court ruled that the autopsy report was inadmissible and Atlas contends the trial court committed reversible error in refusing to allow the report into evidence We disagree

The Supreme Court in its Supplemental Opinion on Rehearing in *Horn v Sturm*, Okl, 408 P 2d 541, 549–50, recognized that autopsy reports could be made to obtain information useful in defending a damage suit and held they should not be placed in the category of hospital records for evidentiary purposes Further, the court stated that the report was admissible after proper identification and after the doctor who performed the autopsy was called to identify the report and testify in regard thereto Although Atlas did follow the procedure outlined in *Sturm* this does not mean that the contents of the autopsy report did not have to be examined by the trial court to determine if there were statements contained therein which were not admissible

The autopsy report contained many statements prejudicial to plaintiffs and which had little, if any, probative value on the *issue which Atlas sought to establish by* introduction of the report, i. e., that decedent suffered from physical conditions which would have shortened his life expectancy. Many other statements were beyond the expertise of a pathologist and, as such, a pathologist's opinion thereon would be inadmissible. Other recitals were pure speculation on the part of Dr. Lowbeer. This court does not deem it necessary to summarize all the statements which would have been inadmissible, rather only a few will be reproduced to illustrate the problem. The report recited:

> [T]he velocity in this case may well have approached 5000 feet per second and more.
>
> It appears, that any protective clothing of any thickness or resistance would be a great help in eliminating flashburns and minimizing splinter perforations.
>
> Exactly how the explosion occurred is only a matter of speculation.
>
> For some reason, he must have put down the two boxes with the loose caps with too much force; or else they slipped slightly out of his hands; or else he slipped on the sandy floor. It appears fairly certain that the explosion occurred first in one of the two boxes with the loose caps, *which perhaps raises the question of handling such boxes even more delicately than necessary even in a tightly packed box.* (Emphasis original.)
>
> [H]e may have dropped the box during such sudden episode of chestpain; this of course is purely speculative.
>
> The man could have had a sudden episode of dizziness as is often found in such anatomic conditions and for that reason slipped or dropped the box or boxes. This also is a matter of speculation; but it does raise the question, whether not everybody engaged in such potentially dangerous work, should have periodic thorough physical examination and knowledge of their health status, particularly over the age of 60
>
> But it also should be known of anyone in a dangerous occupation whether or not he indulges in alcohol, constantly or periodically. *Again this is a matter of sheer* conjecture.

Because many of the statements in the autopsy were outside the expertise of Dr. Lowbeer, not probative on the issue which they were offered to show, or speculative, the autopsy report was not admissible in its entirety.

[21] Where a document contains evidence which is inadmissible, the party offering the document may omit the inadmissible part and offer those portions which are admissible. *New York Life Ins. Co. v. Gibbs*, 176 Okl. 535, 56 P.2d 1179. However, nowhere in the record did Atlas move to have only the admissible portions of the autopsy report introduced into evidence.

[22] Furthermore, Atlas contends the autopsy report "would have demonstrated that decedent suffered from conditions *which would have materially shortened his* work and life expectancies." However, Dr. Lowbeer testified concerning his autopsy findings insofar as they bore upon the life expectancy of decedent.

We find no error in the trial court's refusal to admit the autopsy report into evidence.

VI. Withdrawal of Pre-Trial Stipulation

Atlas contends the trial court committed reversible error by denying Atlas' counsel the right to amend or withdraw a stipulation agreed to by the parties before trial. The stipulation reads as follows:

> 10. That at all times material to this case, Atlas was engaged in the business of manufacturing, packaging and selling fuse caps.

Defendant-Atlas is a Rhode Island corporation. On the fourth day of trial, Atlas tried to withdraw Stipulation Number 10 asserting the Rhode Island corporation had never manufactured, distributed or sold dynamite caps. Rather, a Delaware corporation with the same name was the cap manufacturer. The attorney for the Delaware corporation,

Mr Quinlin, was present when the pre-trial stipulation was entered into Both corporations are wholly owned subsidiaries of the Tyler Corporation

Defendant-Atlas sought to withdraw this stipulation after three full days of a jury trial and the majority of plaintiffs case had already been presented, plaintiffs had already presented eight of their fourteen witnesses Defendant-Atlas stated they did not intend to defend on the basis that the wrong corporation was sued and plaintiffs had not attempted to secure evidence on this point and proceeded to trial without concern for the required elements of proof In denying defendant-Atlas motion to withdraw, the trial court stated

THE COURT Well, I want to ask some questions too

First of all, for the record Mr Rogers, the Court is shocked that you would come in here on the fourth day after this case was started, and after we spent three and a half hours on stipulations, one of which you now ask the Court to allow you to withdraw If the Court's memory is right Mr Quinlin was present with you at all times during this conversation Is this not correct?

MR ROGERS *That is correct*

THE COURT *And he sat here and allowed you to make the stipulations* I don t know what has happened in this case since I saw you yesterday morning, I have no idea, but the Court certainly takes a dim view of attorneys who want to play games like this with the Court I am not too receptive to your motion, frankly

MR ROGERS I appreciate that Your Honor but I will tell you I did not lay behind a log on it intentionally it did not come to my attention that this was—

THE COURT I don t know if you did or not but I think this is a matter for the Appellate Court to determine *We are in the middle of trial and I think you have waived You have already made opening statement and have told this jury who you are and who you represent and not one thing has peeped in an opening statement to this jury that you are the wrong corporation* I think it's—

MR ROGERS *No, we did not intend to defend it on that basis*

THE COURT Well I don't care if you did or not, but if you had a defense to it that was the time to do it and not take more of the Court s time with it

MR ROGERS This as I say has come to light insofar as I m concerned right now

THE COURT I think that is something you will have to take care of on down the line I am going to overrule your request and allow you an exception

(Emphasis added)

[23] The Supreme Court in *McFarling v Demco Inc*, Okl 546 P 2d 625 630–31, discussed standards for allowing the withdrawal of a stipulation First there must be a clear showing that the fact stipulated to s untrue Second, the motion to withdraw the stipulation must be timely made Second the motion to withdraw the stipulation must be timely made The motion to withdraw was not timely Defendant-Atlas attempted to withdraw the stipulation four days into the jury trial In *McFarling*, the motion to withdraw was entered a day before the trial date

[24] The third standard is good cause must be shown for relief The *McFarling* court considered lack of negligence as a factor showing good cause We feel lack of negligence is not present in this case Mr Quinlin the attorney for the Delaware corporation was present when the stipulation was entered into We believe with due diligence the fact Defendant-Atlas did or did not manufacture caps could have been ascertained by defendant s counsel prior to agreeing to the stipulation There are no grounds for relief where lack of knowledge s due to the failure to exercise due diligence 83 C J S Stipulations § 35b(2) at p 91 (1953) 73 Am Jur 2d Stipulations § 14 at p 551 (1974)

[25] Fourth, the fact must be one of material character which changes the rights of the parties. Fifth, the opposing party must not have detrimentally relied and changed his position. The *McFarling* court considered this to be the crucial question. Although we find no specific ruling by the trial court upon this question, the evidence sufficiently reveals plaintiffs did detrimentally rely on the stipulation. In view of the stipulation, plaintiffs had not secured evidence on the issue and proceeded to trial under the assumption that the party sued was the manufacturer. Plaintiffs had already presented much of their case to the jury when the motion to withdraw was made. The sixth factor is that the failure to allow the stipulation will result in manifest injustice to one of the parties. The last consideration is whether the trial court abused its discretion. Under the facts and circumstances of this case, we can not say the trial court abused its discretion.

Accordingly, the trial court's refusal to allow the withdrawal of Stipulation Number 10 is affirmed.

VII. Excessive Verdict

[26, 27] Atlas contends the verdict was excessive due to improper instructions and passion, prejudice and bias on the part of the jury. Atlas complains of Instructions 17 and 18; however, both adequately describe the various recoverable items and we find no prejudicial error contained within either. A verdict will not be interfered with by an appellate court where the issues have been fairly submitted under proper instructions. *Hampton v. Danks*, Okl., 387 P.2d 609. A reviewing court has no right to place limitations upon the amount of damages returned by the jury unless it is convinced that the amount of recovery bears no relation whatever to the evidence, or that it was induced by bias or prejudice on the part of the jury. *Tulsa City Lines v. Geiger*, Okl., 275 P.2d 325. See also *First Nat'l Bank of Amarillo v. LaJoie*, Okl., 537 P.2d 1207; *Vickers v. Ittner*, Okl., 418 P.2d 700.

The jury returned the following verdict:

Pain and Suffering	$ 50,000.00
Medical	504.20
Widow	200,000.00
Iris (Decedent's daughter)	10,000.00
Joyce (Decedent's daughter)	10,000.00
Funeral	1,541.08
Total	$272,045.28

There is no dispute as to the amounts awarded for the funeral expenses and medical bills.

[28] In regard to the $50,000.00 pain and suffering award, Atlas contends the jury awarding this sum shows passion and prejudice because the pain and suffering "admittedly lasted no more than two or three hours." There is no fixed rule whereby damages for pain and suffering alone can be measured. Compensation for pain and suffering rests in the sound discretion of the jury, because "there is no 'market where pain and suffering are bought and sold, nor any standard by which compensation for it can be definitely ascertained, or the amount actually endured determined.'" *Denco Bus Lines v. Hargis*, 204 Okl. 339, 229 P.2d 560, 563, quoting *St. Louis S. W. R. Co. v. Kendall*, 114 Ark. 224, 169 S.W. 822, 824. See also *Chicago, Rock Island & Pacific R. R. Co. v. Hawes*, Okl., 424 P.2d 6; *Marathon Battery Co. v. Kilpatrick*, Okl., 418 P.2d 900.

[29] The injuries decedent received due to the explosion included multiple blast wounds to the face, chest and abdomen, both of his lower legs had been blown away, his right hand was gone with near amputation of his left hand and both eyes were severely injured. According to the ambulance driver, decedent was conscious during the ride to the emergency room and during the trip to Tulsa. The driver believed decedent was suffering quite a lot of pain. The treating physician at the emergency room, Dr. Hesson, testified decedent was conscious and in pain. Dr. Hesson could not give him adequate pain medication. Because decedent's arms had been blown apart, Dr. Hesson was not able to ascertain a blood pressure. Although morphine or

demerol would normally have been used, Dr Hesson only administered Talwin which only "takes the edge off" without lowering blood pressure

We find that the award for pain and suffering was adequately supported by the evidence and not induced by bias or prejudice on the part of the jury

[30] Vivian Lauderdale, the widow of decedent, received an award of $200,000 00 for pecuniary loss and loss of services Mrs Lauderdale is 56 years of age and was married to decedent 32 and a half years Before he retired, decedent would have earned approximately $60,000 Mrs Lauderdale was also entitled to be compensated for loss of consortium, including loss of advice, comfort, companionship and services The jury was in a better position to determine the dollar amount of Mrs. Lauderdale's pecuniary loss We feel the evidence was adequate to support their verdict Although Dr Lowbeer testified decedent would have had a shorter than normal life expectancy, Dr Hesson stated the findings of Dr Lowbeer were not unusual and decedent could have survived an average life span with reasonable medical care The jury s duty is to determine facts from conflicting evidence This court finds that the award to Mrs Lauderdale was not excessive

[31] The two married adult daughters of decedent were awarded $10,000 each Adult children can recover in wrongful death actions The correct measure of damages is the pecuniary loss suffered by reason of the death of their father *Belford v Allen*, 183 Okl 256, 80 P 2d 671 *Gypsy Oil Co v Green*, 82 Okl 147, 198 P 851, *Pressley v Incorporated Town of Sallisaw*, 54 Okl. 747, 154 P 660 Pecuniary loss was discussed in *Rogers v Worthan*, Okl., 465 P 2d 431, 438–39, as follows

> Recovery in a wrongful death action is not contingent upon a showing that the claimant had been dependent, to some extent, upon the deceased Even great wealth would not of itself, preclude the recovery of damages for any pecuniary benefits which a claimant might reasonably have expected to receive if the deceased had lived
>
> *The basic factor controlling recovery* in such an action is not whether the claimant had been dependent upon the deceased for support, but *is whether, in the circumstances disclosed by the evidence in the particular case, it can reasonably be said that there was a probability, or a reasonable expectancy on the part of the claimant, that the decedent, except for his death, would have contributed money, aid, services, or anything else that would have a pecuniary value to the claimant.* (Emphasis added.)

[32, 33] Both daughters testified as to services, aid and money provided by decedent, such as wedding, birthday and Christmas gifts, assistance in moving, arranging for burial of a grandchild, paying for groceries, providing family barbeques and the boat for family recreation, giving business guidance, welding services, helping with household repairs, babysitting, co-signing notes and loaning money which was never asked to be repaid We feel sufficient evidence existed that decedent contributed money, aid and services with pecuniary value to the daughters On appeal, it matters not that the appellate court might or might not have reached a different conclusion as to the amount of damages suffered and the only question which is presented is whether there is any competent evidence to sustain the verdict *Battles v Janzen*, Okl, 325 P 2d 444

[34] The jury was properly instructed as to the measure of damages, there was competent evidence reasonably tending to support the verdict, and it does not appear from the record that the jury was swayed by passion or prejudice Hence, the verdict will not be disturbed on appeal *Belford v. Allen*, supra

VIII Use of Prepared Board During Closing Argument

During closing argument, plaintiffs' attorney, Mr Sellers produced a board on which figures had been placed before trial The board contained a damage analysis used as an aid to closing argument Ac-

cording to plaintiffs' brief, the items on the board were covered from view by masking tape until actually referred to by Mr. Sellers during his argument. Atlas asserts the use of this board was improper and resulted in an excessive verdict.

[35, 36] In regard to the use of blackboards during closing argument, the Supreme Court in *Shuck v. Cook*, Okl., 494 P.2d 306, 312, stated:

> [W]e adhere to the rule that to grant or refuse the request is within the sound discretion of the trial court who is in the best position to know how error may creep in.

The rule is the same whether counsel places figures on the blackboard prior to or during his argument to the jury. *Fields v. Volkswagen of America, Inc.*, Okl., 555 P.2d 48, 62. We find, under this record, no abuse of discretion.

Furthermore, in *Missouri-Kansas-Texas Railroad Co. v. Jones*, Okl., 354 P.2d 415, 420, the Supreme Court stated another test to determine whether the use of a blackboard was prejudicial to the defendant was whether it resulted in an excessive verdict. See also *Kansas City Southern Railway Co. v. Black*, Okl., 395 P.2d 416, 419. We have already determined, in part VII of this opinion, that the verdict was not excessive.

Atlas asserts the trial court should have given a cautionary instruction or admonished the jury that the board was not evidence. However, neither were requested by Atlas.

We find no error in the trial court's permitting plaintiffs to utilize a prepared board during closing argument.

IX. Prejudgment Interest

Atlas contends in its last proposition of error that the trial court should not have awarded prejudgment interest. Prejudgment interest is allowable under 12 O.S. 1971, § 727, which provides in part:

> 2. When a verdict for damages by reason of personal injuries is accepted by the trial court, the court in rendering judgment shall add interest on said verdict at the rate of six percent (6%) per annum from the date the suit was commenced to date of verdict.

The trial court awarded prejudgment interest in the amount of $53,987.97. The issue is whether prejudgment interest should be awarded under a survival or wrongful death cause of action.

In *Allen v. Hartford Accident & Indemnity Co.*, 190 Okl. 313, 123 P.2d 252, 253, the Supreme Court stated: "A plaintiff in an action for damages for negligence, such as one for wrongful death, may not recover interest prior to the entry of judgment." *Allen* is not controlling inasmuch as it was decided prior to the adoption of Section 727 allowing prejudgment interest.

[37, 38] Plaintiffs' first cause of action was a survivorship action under 12 O.S. 1971, § 1051, which provides, in part:

> In addition to the causes of action which survive at common law, causes of action for an injury to the person . . . shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Because causes of action for personal injuries survive under Section 1051, prejudgment interest awarded under Section 727 "when a verdict for damages by reason of personal injuries is accepted" is properly allowable. Indeed, Atlas does not contend prejudgment interest can not be awarded under a survivorship action. Rather, Atlas contends under *Bossert v. Douglas*, Okl. App., 557 P.2d 1164, the prejudgment interest must be included in the instructions to the jury and merged in the final verdict. It can not be computed and added to the jury's verdict. We find this to be an erroneous interpretation of *Bossert*. Furthermore, the statute specifically requires the court to add the interest onto the verdict.

[39] The remaining issue is whether prejudgment interest should be allowed in a wrongful death action. Oklahoma's wrongful death statute is codified at 12 O.S.1971, § 1053, which provides:

> When the death of one is caused by the wrongful act or omission of another, the

personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, *if the former might have maintained an action had he lived*, against the latter, or his representative, *for an injury for the same act or omission* The action must be commenced within two years The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased. (Emphasis added)

If decedent had lived, he could maintained an action for his personal injuries and recovered prejudgment interest.

In addition, the prejudgment interest statute allows the interest when a *verdict is returned for "damages by reason of personal injuries"* The language of the statute is broad enough to include a recovery for wrongful death by reason of personal injuries when the action is, of necessity, brought by someone other than the person who sustained the injuries Colorado allows prejudgment interest in wrongful death actions. Although the Colorado prejudgment interest statute contains the language "whether such injury shall have resulted fatally or otherwise," the Colorado Supreme Court in *American Ins Co v Naylor*, 103 Colo 461, 87 P 2d 260, 264–65 (1939) construed the phrase "in all actions brought to recover damages for personal injuries" as follows

> There is, of course, no difference in character between fatal and nonfatal injuries The difference is only in degree, from which it follows that the title of the act of which the foregoing section is a part, "An Act providing for interest on damages for personal injuries," Laws 1911, p 296, is sufficient to cover actions for damages resulting from both fatal and nonfatal injuries If the injuries result fatally the person bringing the action will of necessity be some one other than the deceased, which is the situation presented by the cases before us We think it might well be said that a person, as the plaintiff here, who has lost the society, companionship and services of his wife and has expended money in an attempt to minimize or prevent such loss, has himself sustained a personal injury We think it is not necessary however so to hold in order to bring the instant cases within the statute In *Mulvey v Boston*, 197 Mass 178, 83 N E. 402, 14 Ann.Cas. 349, the court, referring to a statute of limitations, said "The language of the statute is not restricted to actions for injuries to the person of the plaintiff, and we think it is broad enough to include all actions of tort founded on injuries to the person of any one in such relations to the plaintiff that the injury causes him damage." Webster's International Dictionary gives as one definition of the word "for," and the one we think applicable to the construction of the statute before us, the following 'Indicating the cause, motive or occasion of an act, state or condition, hence, because of, on account of, in consequence of, as the effect of, for the sake of" We think the actions brought to recover damages for each of these torts were because of, on account of, and in consequence of personal injuries sustained by the plaintiff's wife of such extent that they finally resulted fatally The cross assignments of error therefore must be sustained The reasoning of the courts in opinions rendered in the following cases, though not involving statutes and situations identical with those under consideration in the cases at bar, is in point and supports the conclusion we have reached and expressed herein *Mulvey v Boston*, supra, *Brahan v Meridian Light & Ry Co*, 121 Miss 269, 83 So 467, *Bixby v Sioux City*, 184 Iowa 89, 164 N W 641, *Crapo v Syracuse*, 183 N Y 395, 76 N E. 465, *Titman v Mayor, etc., of City of New York*, 57 Hun 469, 10 N Y S 689, *Price v National Surety Co*, 221 App Div 56, 222 N Y S 437, *Crapo v Syracuse*, 98 App Div 376, 90 N Y S 553, *International & G N Ry Co v Edmundson*, Tex Civ App, 185 S W 402.

See also *Hindel v State Farm Mut Auto Ins Co*, 97 F 2d 777 (7th Cir 1938) (Statute

which provided "for the benefit of all persons who may suffer personal injuries" construed to cover an injury which results in death.); *Harris v. Elliott*, 277 Ala. 421, 171 So.2d 237 (1965), citing *Alabama Great Southern R. Co. v. Ambrose*, 163 Ala. 220, 50 So. 1030 (1909) (An action for wrongful death is an action for personal injuries.); *Wetz v. Thorpe*, 215 N.W.2d 350 (Iowa 1974) (Allowance of prejudgment interest in wrongful death is essential to accomplish full justice.); *Brahan v. Meridian Light & Ry. Co.*, 121 Miss. 269, 83 So. 467 (1919) (The term personal injuries construed to mean all actions of tort founded on injuries to the person and does not refer to only those actions brought by the person receiving the physical impact.); *Weiman v. Ippolito*, 129 N.J.Super. 578, 324 A.2d 582 (1974) (Prejudgment interest allowable in wrongful death action when statute stated the court shall "in tort actions" include prejudgment interest.); 43A C.J.S. Injury at p. 770 (1978) (The word injuries includes all injuries, whether fatal or not.).

We therefore hold that the trial court properly awarded prejudgment interest on the amounts recovered under both the survivorship and wrongful death causes of action. In view of the findings of this court on Atlas' nine propositions of error, the judgment of the trial court is accordingly affirmed in all respects.

AFFIRMED.

ROMANG and REYNOLDS, JJ., concur.

J. Hyrum CALL, Elizabeth H. Call, as co-trustees, W. W. Dillard and Essie Dillard, Husband and Wife, Plaintiffs and Counter Defendants-Respondents,

v.

Virgil A. MARLER and Alice Marler, Husband and Wife, Defendants and Counter Claimants-Appellants.

No. 9531.

Supreme Court of Idaho.

June 25, 1965

Partition action wherein defendant sought accounting for wheat crop. The District Court of the Thirteenth Judicial District, Caribou County, Francis J. Rasmussen, J., entered judgment, and defendants appealed. The Supreme Court, Knudson, J., held, in part, that the stipulation entered into by the parties during the trial abrogated the contradictory pretrial conference order provision to the effect that *the plaintiffs' collection of rent for certain* years was barred by limitation

Judgment modified and affirmed and cause remanded.

1. Partition ⇐89

Evidence in partition action wherein defendants sought accounting for wheat crop established that defendants were entitled to share of crop based on $2.12 rather than a $1.65 per bushel figure used by trial court.

2. Trial ⇐388(1)

Purpose of requiring findings of fact and conclusions of law is to aid appellate court by affording it clear understanding of basis of decision of trial court

3. Appeal and Error ⇐1071(6)

Absence of findings would be disregarded by reviewing court where record was so clear that court did not need their aid for complete understanding of issues.

4. Partition ⇐89

Burden of establishing that rentals were payable to them for years 1947 through 1951 was on defendants, in partition action wherein defendants sought accounting for wheat crop for certain years.

5. Partition ⇐89

Evidence involving testimony of witness who was unable to state kind, amount or value of crop or crops raised or produced during any of years was insufficient to support judgment for defendants, in partition action wherein defendants sought accounting for wheat crop for certain years

6. Limitation of Actions ⇐85(5)

Since statute of limitations may have been suspended during time plaintiff tenants in common were absent from state, collection of rents by defendant tenants in common for certain years was not barred by statute of limitations. I.C. § 5-229.

7. Stipulations ⇐18(4)

Stipulation entered into by parties during trial abrogated contradictory pretrial conference order provision to effect that parties had agreed that collection of rents for certain years was barred by limitation. I.C. § 5-229, Rules of Civil Procedure, rule 16

8. Stipulations ⇐16

Stipulations are ordinarily entered into for purpose of saving time, trouble or expense, and as general rule parties are bound thereby.

9. Stipulations ⇐13

Court may in its sound discretion relieve against stipulation entered into through mistake or misunderstanding of fact or entered into inadvertently, inadvisedly, or improvidently where under all circumstances its enforcement would work injustice

10. Partition ⇐114(1)

Each party was properly ordered to *bear own trial court costs in partition action* wherein defendants sought accounting for wheat crop, both parties prevailed, and defendant appellants' costs were not shown to have been in excess of costs incurred by plaintiffs I.C. §§ 12-102, 12-104.

R. M. Whittier and L. Kim McDonald, Pocatello, for appellants.

Jones, Pomeroy & Jones and Racine, Huntley & Olson, Pocatello, for respondents.

KNUDSON, Justice.

Plaintiffs-Respondents, J. Hyrum Call, Elizabeth H. Call, as co-trustees, W. W. Dillard and Essie Dillard, husband and wife, commenced this action seeking a partition or sale of 160 acres of land which they held as tenants in common with defendants-appellants, Virgil H. Marler and Alice Marler, husband and wife. Defendants filed their answer contending the property could not be partitioned, and also by way of counterclaim sought an accounting of rents and profits allegedly received by plaintiffs and their predecessors in interest while they occupied or had the use of the land involved.

The partition of the land has been accomplished and it has been stipulated that any matters relating to the division of the land are no longer to be considered as an issue on this appeal.

The issues created by the pleadings involve rents and profits which allegedly accrued during 1947 and subsequent years. Defendants acquired their undivided one-half interest in the land under deed executed by Hazelle McDonald and Eugene P. McDonald, wife and husband, dated April 19, 1960 (Def. Exh. I). Prior to said transfer the McDonalds and respondents W. W. Dillard and wife were owners of the land as tenants in common. Prior to the commencement of this action (March 20, 1961) the McDonalds had filed an action against the Dillards in Los Angeles County, California, seeking to recover for past due rentals relative to the property here concerned. Under date of June 9, 1960, McDonalds assigned their right, title and interest in and to said cause of action to defendants, Marlers.

In 1961 plaintiffs Calls entered into a purchase contract whereby they agreed to purchase all interest which the Dillards had in the land and also agreed to pay any moneys due to the defendants by reason of their succession to the rights of McDonalds.

Trial was had before the court sitting without a jury and judgment was entered June 19, 1964 in favor of defendants in the amount of $1,889.03, together with interest and without costs. This appeal is from said judgment.

[1] Under appellants' assignments of error Nos. IV, V and VI it is contended that the trial court did not allow appellants compensation to which they were entitled for their proper share of the wheat crop raised on 40 acres of the land which had been farmed by Calls during 1961. These assignments are not discussed by respondents in their brief.

The evidence established that 1384.83 bushels of wheat had been raised on said 40 acres during 1961 and the court found that 346.3 bushels constituted appellants' share of such crop. The findings do not disclose the steps considered or method employed by the court in arriving at that figure, however it amounts to one-fourth of the total crop which is in keeping with the percentage allowed each of the owners as concerns the other crops produced during that year on the land involved and constituted a fair and reasonable apportionment. We are unable to find in the record support for the court's conclusion that such wheat was worth only $1.65 per bushel. Plaintiffs' Exhibit B discloses that one-half of that crop of wheat was sold for $2.12 per bushel and since there is no other competent evidence of the value, appellants should be awarded $734.15 instead of $571.40 as their share of said crop.

Appellants contend that the court erred in failing to make findings of fact and conclusions of law relative to appellants' claim for rents and profits for the years 1947 through 1951. The court did find that plaintiffs' predecessors in interest, the Dillards, resided outside of this state during said period, and that the rents payable to defendants or their predecessors in interest, the McDonalds, for said years were due and

payable in this state as rents on Idaho real property.

[2, 3] The purpose of requiring findings of fact and conclusions of law is to aid the appellate court by affording it a clear understanding of the basis of the decision of the trial court. The absence of findings may be disregarded by the appellate court if the record is so clear that the court does not need their aid for a complete understanding of the issues. Merrill v. Merrill, 83 Idaho 306, 362 P.2d 887, Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788. In view of the condition of the record before us, we consider this rule to be applicable herein.

[4, 5] The burden of establishing that rentals were payable to them for the years 1947 through 1951 was on appellants. The only evidence submitted relative to said period was the testimony of one witness who was unable to state the kind, amount or value of the crop or crops raised or produced during any of said years. The proof submitted was incompetent and insufficient to support a judgment of any amount in favor of appellants under said claim.

Appellants contend that the court erred in finding that the defendants, as tenants in common with plaintiffs, were precluded from recovering their share of past rentals and profits because of the running of the statute of limitations and in failing to set aside pretrial conference order that had been erroneously ordered by the court.

The rents and profits involved under these assignments of error were originally those allegedly owed from respondents Dillards to the McDonalds as the latter's cotenants share for the years 1952 through 1956. Appellants claim such rentals under an assignment from McDonalds and seek to recover them under their counterclaim.

The record discloses that a pretrial conference was had before the court on February 7, 1962, at which time all of the parties involved were represented by their respective attorneys. On April 13, 1962, a pretrial conference order was entered and filed which stated that the parties had stipulated the following quoted paragraph 6:

> "6. That $1,000.00 per year was paid by the Calls to the Dillards for rent for the years 1952, 1953, 1954, 1955, and 1956. That the collection of these rents by the defendants, Marlers, is barred by the Statute of Limitations."

The order further directed that a copy thereof be mailed forthwith to each of the counsel for the parties. It also ordered that the case be set for trial to commence April 30, 1962.

On October 2, 1962 the court made findings of fact and conclusions of law wherein, at paragraph 7 thereof, it is stated that the court finds:

> "7. That the parties agree the collection of rents for the years 1952, 1953, 1954, 1955 and 1956 is barred by the Statute of Limitations.'

These findings were filed October 3, 1962.

On October 17, 1962, defendants filed their objections to the findings and conclusions wherein it is stated that the defendants

> "object to finding number 7 for the reason that the Defendants and Counter-Claimants do not agree that the collection of the rents for the years 1952 through 1956 is barred by the Statute of Limitations.'

On the same day defendants filed their motion to strike from paragraph 6 of the pretrial conference order the following quoted language:

> "That the collection of these rents by the Defendants Marlers, is barred by Statute of Limitations.'

As a part of said motion defendants also stated that in the alternative they moved to have the case reopened and to permit counsel to have the pretrial statements amended and a hearing had relating to the running of the statute of limitations. This motion was supported by the affidavit of R. M. Whittier attorney for defendants, wherein the affiant states positively and unequivocally that the defendants did not

enter into a stipulation as stated in said paragraph 6 of the pretrial conference order. By order dated February 29, 1964 and filed March 4, 1964, defendants' said motions were denied on the ground that the motion was not timely.

The supporting affidavit contains the following explanation of defendants' delay in presenting such motion to strike:

"Your Affiant further states that Item 6 of the pre-trial conference order was permitted to stand without any mention for the reason that the Defendants and Counter-Claimants, Marlers, and their attorney over-looked and did not become advised of the contents of Item 6 of the pre-trial order until this date and that it was assumed by the Defendants and Counter-Claimants that the facts were that this was an issue which was in accordance with the Defendants' pre-trial statements to the Court furnished at the time of the pre-trial hearing and that this is a matter of oversight or excusable neglect and that great and irreparable harm would result if this order was permitted to stand undisturbed."

In support of appellants' contention that it is evident from the record that neither court nor counsel considered that such a stipulation had been entered into at the pretrial conference, our attention is called to the following quoted stipulation which was entered into in open court during the trial and as a part of defendants' case, to-wit:

"MR. WHITTIER: Before proceeding further, I wonder if counsel would stipulate the fact that—in one of these issues is whether the statute of limitations has run. I wonder if it could be stipulated that Mr. Dillard has been out of the State of Idaho for the years 1947 through 1962.

"THE COURT: Mr. Racine.

"MR. RACINE: Well, —

"MR. WHITTIER: Or do you want me to produce evidence on this?

"MR. RACINE: No, I think not. We understand generally that he has been a resident of California although occasionally in the State of Idaho, Your Honor, and we—

"THE COURT: Not as a resident in the State of Idaho, but as—

"MR. RACINE: Not as a resident in Idaho.

"THE COURT: —only as a visitor.

"MR. RACINE: As a visitor.

"THE COURT: The record will show that you gentlemen have stipulated that W. W. Dillard and Essie Dillard have been residents of California during the terms—times in question in the cross complaint."

The provisions of I.C. § 5-229 are pertinent to the foregoing stipulated facts. Said section provides:

"If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

[6] Since the statute of limitations may have been suspended during the time Dillards were absent from this state, it is evident from the foregoing stipulated facts that the collection of rents for the years 1952 through 1956 was not in fact barred by the statute of limitations. Consequently the above quoted stipulation is exactly contrary to the stipulation stated in the pretrial conference order. Obviously only one of them can be given effect. Appellants contend that the stipulation made during the trial should control since it is a stipulation of fact while the other was a stipulation of law and not binding on the court (John Hancock Mutual Life Insurance Co. v. Niell, 79 Idaho 385, 319 P.2d 195), or on the parties. Cox v. City of Pocatello, 77 Idaho 225, 291 P.2d 282.

The pretrial conference order is governed by I.R.C.P. Rule 16, which states in part:

> "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

[7-9] Stipulations are ordinarily entered into for the purpose of saving time, trouble or expense and as a general rule the parties are bound thereby. However a court may in its sound discretion relieve against a stipulation entered into through mistake or misunderstanding of fact or entered into inadvertently, inadvisedly, or improvidently where under all the circumstances its enforcement would work an injustice. Bradford v. Schmucker, 10 Cir., 135 F.2d 991, and cases cited therein. Concerning this subject this court, in Koepl v. Ruppert, 29 Idaho 223, 158 P. 319, stated:

> "Furthermore, it is within the sound judicial discretion of a trial court, for good cause shown and in furtherance of justice, to relieve parties from stipulations which they have entered into in the course of judicial proceedings, and it is its duty to do so when enforcement thereof would be inequitable and when, as in this case, all parties to the action will, by vacating the stipulation, be placed in exactly the same condition they were in before it was made."

In the instant case appellants contend that since the court heard evidence on the matter and respondents stipulated that the Dillards did not reside in Idaho during the stated years and the rental involved during those years was recognized as an issue in the case, they were entirely misled by the court's recognition of the challenged portion of the order.

I.R.C.P. 16 expressly authorizes modification of the pretrial conference order during the trial. Since paragraph 6 of said order is contrary to the stipulation entered into during the trial, the latter must be regarded as a modification of the order to the extent that it nullified said paragraph 6 of the order. We therefore conclude that the court erred in finding "that the parties agreed the collection of rents for the years 1952, 1953, 1954, 1955 and 1956 is barred by the Statute of Limitations."

[10] The trial court held that each party bear their own costs. Although error is assigned to this order, it is not discussed in respondents' brief. Appellants contend that since they were awarded a judgment for a net sum of $1,889.03 and interest they were entitled to recover their costs pursuant to the provisions of I.C. § 12-104.

This action was originally concerned with a partition or sale of real property which in its nature involves title or possession of real estate. By their counterclaim appellants introduced the issue involving the recovery of money. The issues presented by both parties were tried together and at the same time. Respondents were successful in their action seeking partition and under I.C. § 12-102 they likewise were entitled to recover costs incident to their action.

In the absence of a showing on the part of appellants that the costs which they incurred in the prosecution of their counterclaim exceeded the costs allowable to respondents under the judgment decreeing partition, appellants were not entitled to the relief requested. There being no such showing the claimed error is without merit.

The judgment of the trial court is modified and the cause remanded with directions to the trial court as follows:

(1) To strike paragraph 7 from its findings of fact.

(2) To consider such evidence as has been introduced and to hear and consider such additional evidence as the parties or any of them may offer in support of or

FIRST OF DENVER MORTGAGE INVESTORS and Citibank, N.A., Plaintiffs and Appellants,

v.

C. N. ZUNDEL AND ASSOCIATES, a limited partnership, et al., Defendants and Respondents.

FIRST OF DENVER MORTGAGE INVESTORS, et al., Plaintiffs and Respondents,

v.

C. N. ZUNDEL AND ASSOCIATES, a limited partnership, Bland Brothers, Inc., et al., Defendants and Appellant.

Nos. 15696, 16051.

Supreme Court of Utah.

Aug. 24, 1979.

Appeal was taken in separate but related proceedings in the Second District Court, Davis County, J Duffy Palmer, J , involving allocation of priorities between mortgagees foreclosing against real property and competing lien claimants who provided services and materials for improvements to the property The Supreme Court, Stewart, J , held, inter alia, that the trial court properly determined that the mechanics and materialman's liens had priority over the trust deed

Affirmed and remanded

1. Mechanics' Liens ⇐43

It is not necessary to attachment of mechanics lien that material or labor be furnished solely on building structure or that work be performed solely on lot on which building is being erected, and contractor should not be barred from enjoying benefits of mechanics lien statute where his work not only enhances value of developer s land but is also necessary to make residences to be built on such property habitable U C A 1953, 38–1–3

2. Mechanics' Liens ⇐35

Contractor was entitled to mechanics' lien in connection with construction project on 44–acre subdivision for its services in locating existing lines and putting in pipeline, water and sewer systems and storm drains U C A 1953, 38–1–3

3. Mechanics' Liens ⇐173

Where mortgage loan involved blanket mortgage covering entire 44–acre subdivision comprising single dwelling lots and condominiums, and initial work of contractor in locating existing lands and putting in pipelines, water and sewer systems and storm drains related to and benefited entire subdivision, such work could not be characterized as being "off-site" improvements that would not impart notice to lenders; therefore, mechanics' liens arising from furnishing of materials and labor both on overall development site and on individual condominium units within development related back to initial work done on project U C. A 1953, § 38–1–3

4. Mechanics' Liens ⇐208

To be valid and binding, waiver or release or mechanics lien by contractor agreement must be supported by legal consideration, when contractor received cash and property in exchange for release of lien, its release of lien rights was therefore binding as to those rights accrued up to time of release U C A 1953, 38–1–3

5. Mechanics' Liens ⇐166

Where work of all other lien claimants on construction project was completed prior to date on which one claimant released its lien in exchange for cash and property, and other claimants' rights had already attached, such other claimants who were not parties to relief and did not consent to its terms, were not affected by relief and such other lien claimants were entitled to same priority date as that originally accorded to releasing claimant U C A 1953 38–1–3, 38–1–10

6. Stipulations ⇐3

Courts are ordinarily bound by stipulations between parties, but such is not case when points of law requiring judicial determination are involved

7. Stipulations ⇐13, 16

Parties are bound by their stipulations unless relieved therefrom by court, which has power to set aside stipulation entered into inadvertently or for justifiable cause.

8. Appeal and Error ⇐846(5)

Where, in proceedings involving priority of mechanics' lien claims versus claims of mortgagee, record contained no findings as to validity or effect of one claimant's stipulation waiving its lien, Supreme Court would not consider such matter for first time on appeal.

9. Stipulations ⇐17(2)

Whatever effect of stipulation by mechanics' lienholder concerning lien's priority status with reference to trust deed, other lien claimants who sought priority over trust deed were in no way bound by stipulation to which they were not parties.

10. Appeal and Error ⇐790(2)

Appeal involving priority of mechanics' lien claimants with references to trust deed on construction project was not moot where, although sheriff's deed in foreclosure had been issued to mortgagees, they had not paid amount bid into court as ordered and thus should not have received deed and lien claimants who had been adjudged to have first priority had not been paid. Rules of Civil Procedure, rule 69(e)(4).

11. Appeal and Error ⇐337(1)

Appeal involving issue of priority of mechanics' lien claims with reference to lien of deed of trust on construction project was not premature, despite fact that various cross claims and counterclaims had not been resolved by trial court, where such cross claims and counterclaims were unrelated to issue of lien priority and no further judicial action remained to be taken with respect to issues of priority and sale of property. Rules of Civil Procedure, rules 54(b), 72(a).

12. Mortgages ⇐575

In proceedings involving foreclosure under deed of trust, trial court retained jurisdiction over enforcement of its decree even after appeal was taken from its determination regarding lien priorities where no supersedeas bond was posted prior to sheriff's sale or before motion was made to have sale vacated.

Richard H. Nebeker, Salt Lake City, for plaintiffs and appellants in 15696 and for plaintiffs and respondents in 16051.

J. Anthony Eyre, George H. Speciale, Milo S. Marsden, Jr., Albert J. Colton, Robert S. Howell, David H. Schowbe, Richard C. Davidson, Carvel R. Shaffer, Salt Lake City, George K. Fadel, Albert E. Mann, Bountiful, John H. Kelly, pro se., LeRoy S. Axland, Randy S. Ludlow, Salt Lake City, for defendants and respondents in 15696.

Robert C. Cummings, Salt Lake City, for defendants and appellant in 16051 and for defendants and respondents in 15696.

Gordon A. Madsen, Robert F. Orton, Salt Lake City, for defendants and appellants in 16051.

STEWART, Justice:

This appeal from the district court consolidates two separate but related proceedings. These proceedings involve the allocation of priorities between mortgagees foreclosing against real property in Davis County, Utah, and competing lien claimants who provided services and materials for improvements to the property.

Plaintiffs, First of Denver Mortgage Investors ("FDMI") and Citibank, N.A., were granted a judgment against defendant Mountain Springs by the trial court on December 20, 1977, in the amount of $2,358,-396.08. The amount represented $1,558,-005.51 in outstanding principal and $800,-390.57 in interest. The judgment was secured by a lien on the Lakeview Terrace subdivision. The court's conclusions of law include the following:

4. Plaintiffs have stipulated in open court that they shall bid only the sum of one million nine hundred thousand for said property [at the sheriff's sale] and take no deficiency judgment against the defendant, Mountain Springs Construc-

tion Company, nor against any of the individual guarantors

The Judgment and Decree of Foreclosure states

> The priority of the mechanic's and materialmen's liens is reserved for future determination and shall be set forth in a supplemental Judgment and Decree of Foreclosure to be entered prior to Sheriff's Sale.

The Decree further provides

> that the proceeds of sale be applied in payment of the Sheriff's cost of sale and thereafter to the parties in accordance with the priority to be determined by the court .

The court subsequently entered its order awarding priority to mechanics liens claimed by eight defendants. The appeal from that order by plaintiffs is Case No. 15696 in this Court.

In a consolidated case, No. 16051, defendant Bland Brothers, Inc. ("Bland Bros.") appeals from the lower court's denial of its motion to set aside the sheriff's sale held pursuant to the foreclosure action and raises procedural issues in connection therewith. We shall examine first the common facts underlying these cases and then deal separately with the issues raised on appeal.

This litigation concerns a subdivision which originally comprised 44 acres in Bountiful, Utah, known as Lakeview Terrace subdivision A trust deed was recorded as to this property on August 1, 1973, when plaintiff FDMI made a loan of $450,000 to C N Zundel and Associates, a limited partnership In November 1973 defendant Child Brothers, Inc. ("Child Bros ") commenced the first work on the property for C.N Zundel The work consisted of locating existing lines and putting in pipeline, water and sewer systems, and storm drains Subsequently, the original FDMI loan was refinanced, and the 1973 trust deed released, with FDMI advancing $1,500,000 to Zundel and several limited partners This amount was secured by a new trust deed recorded on February 19, 1974. The construction loan was for the financing of improvements on the 44-acre property, which was to comprise 54 single-family building sites and 69 condominium units The loan was due and payable on January 15, 1976.

On August 8, 1975, Zundel conveyed the property to Mountain Springs Construction Company, whose stockholders were the same individuals who had been Zundel's limited partners Because Zundel had become delinquent on the FDMI loan, FDMI on September 8, 1975, filed its first complaint for foreclosure In November FDMI concluded a supplemental loan agreement with Mountain Springs, the successor to C N. Zundel and Associates, which modified the construction loan so as to require repayment in installments in July 1976, October 1976, July 1977, and December 1977

The following lien claimants first performed work on the Lakeview property for Mountain Springs on the dates indicated Child Bros , November 15, 1973, Duncan Electric, January 22, 1975, Robert J Wardrop, December 1, 1975, Countertop Shop, Inc., March 9, 1976, Max D Scheel, April 19, 1976, Ronald Graham Tile Co , March 23, 1976, and Bland Bros , March 8 1976 Additionally, Holt-Witmer provided wallpaper and linoleum under contract with Zundel commencing January 1, 1975 Except for Child Bros , the lien claimants all performed labor or furnished materials on various condominium units situated on the property [1]

In June 1976 Child Bros , as credit in the approximate amount of $22,000 toward the sum owed by Zundel and Mountain Springs, accepted a check for $13,210 and a warranty deed to two lots in the subdivision FDMI's trust deed provided that the title to the property deeded to Child Bros would revert to FDMI if the required payment was not made by July 1, 1976 In exchange for the payment in cash and property, Child Bros executed a release of all liens and

1. On June 13 1979 orders of dismissal based on settlements between the parties were entered in this Court dismissing the following parties Child Bros Duncan Electric, Countertop Shop and Holt Witmer

claims. The release was recorded on June 22, 1976.

Mountain Springs failed to pay the July 1976 installment on its note to FDMI. A partial assignment of the promissory note and trust deed from FDMI to Citibank, N.A., was recorded on July 30, 1976, and FDMI and Citibank on August 2, 1976, filed an amended complaint seeking foreclosure of the property Mountain Springs answered, counter-claimed for damages, and filed a lis pendens against the property. One year later Child Bros. cross-claimed for money due and failure of warranty on the lots conveyed to it. Subsequently, the plaintiffs and the lien claimant defendants moved for summary judgment.

Following the December 20, 1977, hearing, plaintiffs were awarded a judgment against Mountain Springs; the question of lien priority was reserved for later determination. The sheriff's sale took place on January 19, 1978. Plaintiff FDMI bid $1,900,000 for the property; no higher bids were received. On January 24, the court entered a Memorandum Decision awarding the lien claimants first priority over the plaintiffs. That ruling involved total liens in the undisputed amount of $37,397.42. In making its ruling, the court in effect rejected a stipulation signed by attorneys for Child Bros. and FDMI on January 11, 1978, that Child Bros.' lien was junior to the trust deed. The provisions of the Memorandum Decision were embodied in the court's Order Granting Summary Judgment and Order Amending Certificate of Sale on February 1, 1978. Pursuant to this order, the sheriff's certificate of sale was amended to change plaintiff's bid to $1,937,397.42. On February 16, 1978, following the entry of a summary judgment in favor of lien claimant Holt-Witmer, the court entered another order requiring "that the sheriff's certificate of sale shall be amended to show that plaintiff's bid for the property is the sum of $1,944,732.86."

Child Bros.' cross-claim and counterclaims against Zundel, Mountain Springs, and plaintiffs were dismissed following a trial on February 1, 1978. Child Bros.' counsel was not present at the trial for reasons set out in an affidavit filed with Child Bros.' appellate brief.

On these facts, the plaintiffs FDMI and Citibank in Case No 15696 seek reversal of the summary judgment dated February 1, 1978, awarding the named lien claimants priority over plaintiffs' trust deed.

Plaintiffs contend that liens for materials furnished for construction in Lakeview Terrace could not relate back to the date of the first work commenced on November 15, 1973, by Child Bros. for two basic reasons. First, plaintiffs characterize Child Bros.' work as "off-site improvements" and argue that liens arising subsequent to such improvements and after the recording of plaintiffs' trust deed which relate to specific structures cannot relate back to the date of the commencement of Child Bros.' work. Second, plaintiffs rely on Child Bros.' release of its claims to a lien for work performed prior to June 17, 1976. Plaintiffs further argue that the work done in October 1976 by Child Bros. was not under the same contract as work done previously by Child Bros. on Lakeview Terrace and was therefore, as stipulated by Child Bros., junior and subordinate to plaintiffs' trust deed.

Whether the lower court decided the question of lien priority properly depends on a consideration of several propositions of law underlying plaintiffs' contentions.

The first issue is whether the improvements by Child Bros. met the general statutory requirements under Utah law for the attachment of mechanics' liens. The Utah lien statute, § 38-1-3,[2] lists the following persons among those entitled to a mechanics' lien: "Contractors, subcontractors and all persons performing any services or furnishing any materials used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner ."

"The purpose of the lien statutes is to protect those who have added directly to the value of property by performing labor

2. All statutory references are to Utah Code Annotated (1953), as amended.

or furnishing materials upon it," *Stanton Transportation Co v Davis*, 9 Utah 2d 184, 187, 341 P 2d 207, 209 (1959) The broad language, "improvement to any premises in any manner," encompasses the instant case where sewer and water systems were installed on the subject property

[1, 2] It is not necessary to the attachment of a mechanics' lien that the material or labor be furnished solely on a building structure or that the work be performed solely on the lot on which a building is being erected. We agree with the New Jersey Supreme Court, which stated in *J R. Christ Construction Co v Willete Assocs.*, 47 N J. 473, 221 A 2d 538 (1966), that a contractor should not be barred from enjoying the benefits of the mechanics' lien statute where his work not only enhances the value of the developer's land, but is also necessary to make residences to be built on such property habitable. The court held that where a developer engages the contractor to install a sewer system for a subdivision project, the contractor, if he complies with required statutory procedures, is entitled to a mechanics' lien against the developer's property for the cost of labor and materials furnished The New Jersey Court cited *Ladue Contracting Co v Land Development Co*, 337 S W 2d 578 (Mo App 1960), in emphasizing the fact that water and sewer systems are essential to the comfortable and convenient use of dwellings and that it would be "turn[ing] the clock back to another century' to hold that such improvements are outside the terms of the lien statute. (*Id* at 585)

The second issue is whether the priority of materialmen's liens is different with respect to a blanket construction loan for a subdivision comprising single dwelling lots and condominiums as compared with a construction loan for a single dwelling in a subdivision where there may have been 'off-site" improvements that would not impart notice to lenders of the latter type of loan Plaintiffs rely on this Court's decision in *Western Mortgage Loan Corp v Cottonwood Construction Co*, 18 Utah 2d 409, 424 P 2d 437 (1967), to support their argument that our mechanics' lien statute provides that liens are to date back only to the time each individual structure was commenced

Western Mortgage involved the relative priorities of mechanics' liens and a construction mortgage on a single lot in a subdivision. The question was whether lien claimants who had furnished labor or materials that went into the construction of the house on that single lot were entitled to tack for priority purposes to work comprising "off-site improvements," i e., the laying out the subdivision and the installation of water lines, sewer, curb and gutter, and street paving done earlier in connection with the subdivision as a whole. The lien claimants cited § 38–1–5, which reads in part as follows·

> Priority—Over other encumbrances — The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground

This Court held that the recorded construction mortgage took priorit over the mechanics' liens because in that case the liens could not relate back to the date of commencement of off-site improvements. The decision rested on the issue of notice The Court stated, 18 Utah 2d at 412, 424 P 2d at 439

> The presence of materials on the building site or evidence on the ground that work has commenced on a structure or preparatory thereto is notice to all the world that liens may have attached. However, the off-site construction in developing the subdivision for building sites would not necessarily bring to the attention of a lender that someone is claiming a lien on a particular lot in the subdivision This is especially true as in this case, where the lender advanced money

to build a home long after the subdivision had been laid out and developed.

[3] The instant case, however, is distinguishable from *Western Mortgage*. Here we are not dealing with a lender who made a loan on a single lot within a subdivision and who had no reason to be on notice as to the existence of prior work. In this case, the initial work performed by Child Bros. related to and benefited the entire subdivision. The mortgage loan in question was a blanket mortgage covering the entire subdivision. Because the initial work was performed over substantial portions of the property involved, it could not properly be characterized as being "off-site" as were the improvements in *Western Mortgage* in relation to the property that was the subject of the construction loan. Furthermore, the claimant of the mechanics' lien in *Western Mortgage* performed the labor on a lot entirely separate from the initial work. In the present case the claimants performed their work on the same site, i. e., the 44 acres covered by FDMI's construction loan.

Plaintiffs also cite *Aladdin Heating Corp. v. Trustees of Cent. States*, Nevada, 563 P.2d 82 (1977), in which the court refused to relate mechanics' liens back to pre-construction architectural, soil testing, and survey work. The court in *Aladdin* required "visible signs of construction to inform prospective lenders [who inspected] the premises that liens had attached," and the work performed in that case and others cited therein resulted in nothing that would put a lender on notice because of the visibility of the work. In the instant case Child Bros. laid water line and sewer pipe for the subdivision, commencing its first work on November 15, 1973. The trial court made no specific findings as to the visibility of Child Bros.' work at the time the loan agreement was entered into, and this issue was not raised or argued by plaintiffs. The work done by Child Bros., however was concededly more substantial than that done in *Aladdin*. Accordingly, *Aladdin* is distinguishable from the present case.

Based on our statute and the issues submitted by the parties, the materialmen with valid liens stand, in this case, on equal footing in dating their liens from the time work commenced. We therefore hold that the mechanics' liens arising from the furnishing of materials and labor both on the overall development site and on individual condominium units within the development relate back to the initial work done on the project by Child Bros.

A third issue involves the effect of Child Bros.' execution in June 1976 of a document titled "Release of All Liens and Claims" pertaining to the Lakeview property. The notarized release document recited that for a valuable consideration Child Brothers, Inc., by its president, Eugene Child, who signed the document, "release[d] and discharge[d]" Mountain Springs, FDMI, Zundel, and the Lakeview subdivision property,

> from any and all liens, claims, demands, damages, actions at law or in equity arising out of any contractual or other relationship and/or claims of liens, arising or accruing on or before _____ [date omitted], or existing on that date and all matters involved in any and all claims of liens for all labor performed upon, and all materials furnished to [the Lakeview subdivision property] arising on or before, or existing on, the date specified above, by the undersigned, and by all agents, employees, suppliers, [etc.] all of whom the undersigned hereby warrants have been fully paid, and none of whom has any further claim or lien against such real estate as of the date specified above. . .
>
> That the parties hereto intend hereby that this Release of All Liens and Claims shall be a final and complete release and discharge of [Mountain Springs, FDMI, Zundel, and the Lakeview subdivision] by the undersigned, [his heirs, assigns, agents, employees, etc.], and all other persons performing labor upon or furnishing materials as of the date specified above, at the instance of the undersigned.

The document was dated June 17, 1976; it was recorded on June 22, 1976.

As this Court stated in upholding the waiver of lien rights in *Dwyer v Salt Lake City Copper Mfg Co.*, 14 Utah 339, 344, 47 P 311, 312 (1896), "A mechanic's lien is a privilege conferred by statute, and ordinarily may be waived by express agreement of the party in whose favor it exists." The legitimacy of a release of lien rights was also recognized in *G Chicoine Contractors, Inc. v John Marshal Bldg Corp.*, 77 Ill. App.2d 437, 222 N E 2d 712, 714 (1966), where the court stated, "One right the lien claimant has is to execute his full and general waiver releasing his rights to a mechanic's lien against the property" The court then quoted the following language from *Decatur Lumber and Mfg. Co. v Crail*, 350 Ill. 319, 324, 183 N E. 228, 230 (1932):

> While a waiver of lien for a clearly expressed special purpose will be confined by the courts to the purpose intended, yet, where a general waiver is executed, and there is nothing in the context to show a contrary intention, there is nothing left for the court to do but enforce the contract as the parties have made it.

[4] To be valid and binding a waiver or release of a mechanics' lien by contract or agreement must be supported by a legal consideration *Kelly v Johnson*, 251 Ill. 135, 95 N E. 1068 (1911); *Skidmore v Eby*, 57 N M. 669, 262 P 2d 370 (1953) Child Bros., received cash and property in exchange for the release Its release of lien rights is therefore binding as to those rights accrued up to the time of the release, at least as to it.

[5] As to the lien claimants left in the case, all their work on the project was completed prior to the date of Child Bros' release Their lien rights had already attached. These lienholders were not parties to the release, did not consent to its terms, and are not in the category of subcontractors or materialmen performing labor or furnishing materials at the instance of Child Bros, and therefore the release does not affect their status as lienholders. They are entitled to the same priority date as that originally accorded Child Bros, whose work was the first done on the project, in accordance with U C A. § 38–1–10, which provides:

> The liens for work and labor done or material furnished as provided in this chapter shall be upon an equal footing, regardless of date of filing the notice and claim of lien and regardless of the time of performing such work and labor or furnishing such material

A final issue relating to lien priority in this case is whether the stipulation that Child's lien was junior to plaintiffs' had any binding legal effect The stipulation was signed by attorneys for FDMI and Child Bros. on the 11th of January, 1978. It states that Child Bros released its lien against the Lakeview property and that Child Bros was the grantee in a warranty deed recorded June 22, 1976, covering Lots 59 and 60, Lakeview Terrace. The second paragraph states

> Said parties hereby stipulate that the warranty deed is junior and subordinate to the lien or [sic] plaintiff's Trust Deed *and that defendant Child Bros Inc has a lien in the sum of $13,450 52 which lien is junior and subordinate to plaintiff's Trust Deed* [Emphasis added]

[6, 7] Ordinarily, courts are bound by stipulations between parties, *Koron v Myers*, 87 Idaho 567, 394 P 2d 634 (1964), *Riordan v Commercial Travelers Mut Ins Co*, 11 Wash App 707, 525 P 2d 804 (1974) Such is not the case, however, when points of law requiring judicial determination are involved, *Mobile Acres, Inc v Kurata*, 211 Kan. 833, 508 P 2d 889 (1973), *In Re Estate of Maguire*, 204 Kan 686, 466 P 2d 358, modified 206 Kan 1, 476 P 2d 618 (1970), *Cox v City of Pocatello*, 77 Idaho 225, 291 P 2d 282 (1955) Parties are bound by their stipulations unless relieved therefrom by the court, which has the power to set aside a stipulation entered into inadvertently or for justifiable cause, *Klein v Klein*, Utah, 544 P 2d 472 (1975), *Johnson v Peoples Finance & Thrift Co*, 2 Utah 2d 246, 272 P 2d 171 (1954), *Guard v County of Maricopa*, 14 Ariz App 187, 481 P 2d 873 (1971), *Higby v Higby*, Colo App, 538 P 2d 493 (1975), *Thompson v Turner*, 98 Idaho 110, 558 P 2d 1071 (1977)

[8, 9] In the present case, the trial court apparently disregarded the stipulation of FDMI and Child Bros as to lien priority The record contains no findings as to the validity or effect of the stipulation, and this Court will not consider this matter for the first time on appeal Whatever the effect of the stipulation upon Child Bros priority status, the other lien claimants who sought priority over FDMI's trust deed are in no way bound by a stipulation to which they were not parties, *Thomas v State*, 57 Haw 639, 562 P 2d 425 (1977)

[10] Bland Bros, also a defendant in Case No 15696, raises the further issues that this appeal is both moot and premature Mootness is claimed because plaintiff FDMI has bid $1,944,732 86 [3] for the property at the sheriff's sale and is thus required to pay that amount to the sheriff pursuant to Rule 69(e)(4), which states that every bid shall be deemed an irrevocable offer and *that the purchaser is liable on such bid* Because the amount bid would satisfy fully the claims of the lienors, as well as plaintiffs, defendants claim that the plaintiffs have no grounds for bringing an appeal Plaintiffs conceded that should someone pay the amount of $1,944,732 86 during the redemption period, the lien claimants would receive $44 732 86 and the appeal would become moot Otherwise plaintiffs argue that this Court should determine the lien claimants to be junior and subordinate to their trust deed Bland Bros claims that the redemption period cannot expire where no payment has been made pursuant to the order of sale

The record shows that plaintiffs themselves stipulated to the amount to be bid and moved the trial court on the 11th day of February, 1978, to amend the Sheriff s Certificate of Sale to provide that the total amount to be paid was $1 944 732 86, in the event that lien claimant Holt-Witmer was granted first priority An order was signed by the court so amending the certificate of sale Plaintiffs objections at this point are more a change of mind than a justifiable claim of error on the part of the trial court Although a sheriff's deed was issued to the plaintiffs, they have not paid the amount bid into the court as ordered and thus should not have received a deed The lien claimants who had been adjudged to have first priority have not been paid The issues raised herein are not moot

[11] Defendant Bland Bros also argues that this appeal is premature because various cross-claims and counterclaims have not been resolved Unless an appeal may be taken pursuant to Rule 54(b), U R.C P, or our interlocutory appeal procedure, only 'final orders' are appealable to this Court, see Rule 72(a), U R C P Bland Bros claims that there was no final order until lien claimant Holt-Witmer s priority status was adjudicated on February 22, 1978

The order of February 22, 1978, was an amendment to the order dated February 1 *1978* Although the notice of appeal states that it is the February 1 order that is appealed, we deem that order to incorporate by amendment the order of February 22 since it was entered prior to the filing of the notice of appeal Nonetheless, it is clear that certain cross-claims and counterclaims unrelated to the issue of l en priority remain to be adjudicated

Whether an order is deemed a 'final order" is not necessarily dependent in all instances upon whether all issues in a lawsuit have been adjudicated The test to be applied is a pragmatic test See *Brown Shoe Co v United States* 370 U S 294, 82 S Ct 1502, 8 L Ed 2d 510 (1962), Wright *Federal Courts* 505 (3rd ed) In the instant case no further judicial action remains to be taken with respect to the issues of priority and the sale of the property and, but for the appeal sale of the property and disbursement of the proceeds would occur To require the appeal to abide the determination of pending unrelated claims would make an appeal on the issue of priorities moot Unless an appeal may be taken at this point

3. Since this case is to be remanded to the trial court we leave to that court the determination of what effect the settlements made during the pendency of the appeal (see Footnote 1) should make with respect to plaintiffs bid

substantial property interests may be destroyed since the sheriff's sale would proceed and the money would be disbursed on the basis of the priorities determined by the trial court With the issuance of a sheriff's deed and the disbursement of monies, the legal rights and obligations of the parties are finally established Accordingly, under a pragmatic view of the test of finality, the order appealed in this case is final

Consolidated with the appeal of FDMI and Citibank in Case No 15696 is an appeal by Bland Bros , Case No 16051, which challenges the refusal of the trial court to set aside the sheriff's sale held pursuant to the foreclosure order The facts pertaining to this appeal may be set out briefly The Lakeview Terrace property was offered at a sheriff's sale on January 19, 1978 FDMI, pursuant to its agreement, bid the sum (as amended) of $1 944 732 86 and subsequently received the sheriff s deed to the property Before the deed was issued, and when the normal six-month redemption period was about to expire Bland Bros moved the lower court to vacate the sale because plaintiff FDMI had failed to pay the amount of its bid into the court as had been ordered The trial court in an order dated August 15, 1978 denied the motion stating that its jurisdiction was lost when the appeal regarding lien priorities was taken to the Supreme Court The court on its own motion ordered FDMI to post a supersedeas bond in the amount of the claims of the mechanics lienholders who had been adjudged to have first priority

[12] Bland Bros argues that the lower court retained jurisdiction over the enforcement of its decree inasmuch as no supersedeas bond was posted prior to the sheriff's sale or before Bland Bros motion to have the sale vacated This position s correct and is sustained by this Court s opinion in *Skeen v Pratt* 87 Utah 121 at 125 48 P 2d 457 at 458 (1935) which stated

> As an incident to the authority remaining in the trial court to enforce a decree of foreclosure where an appeal is had without a supersedeas bond or stay is the authority to compel compliance with the law with respect to the execution of process, and if for any reason such process is improperly executed, then and in such case to vacate the improper proceeding had pursuant to the process, and order the issuance of another in lieu thereof The court below was in error in holding that it was without jurisdiction to hear and determine the motion to vacate the order of sale

Bland Bros also points out a defect in the publication of notice of the sheriff's sale, namely that there was no publication in a Davis County newspaper in the week immediately preceding the sale as required by Rule 69(e)(1), (3), U R C P Since this issue should be considered by the trial court in connection with the determination as to the validity of the sheriff's sale, we decline to deal with it here

Our decision regarding the priority issue makes it unnecessary to rule on additional matters argued by the parties herein It is the opinion of this Court that the lower court was correct in granting priority to the mechanics lien claimants inasmuch as the initial work by Child Bros established the priority date for all who provided labor and services on the Lakeview Terrace subdivision The action of the trial court as to the setting of priorities is therefore affirmed as it pertains to the lien claimants who remain as parties to this appeal

We affirm the trial court s determination that the mechanics and materialmen s liens of the defendants whose appeal has not been dismissed have priority over FDMI s trust deed We remand for any necessary consideration of the issues raised with respect to the sheriff's sale

Costs to defendants

CROCKETT C J and MAUGHAN, WILKINS and HALL, JJ concur

22 Ariz.App. 591

HARSH BUILDING COMPANY, an Oregon Corporation, Harsh Investment Corporation, an Oregon Corporation; and Harold J. Schnitzer, Appellants,

v.

Sam BIALAC, Jerry Bialac, James F. Bialac, Lee Bialac, Alice Sue Altman and Robert Altman, Appellees.

No. 1 CA-CIV 2752.

Court of Appeals of Arizona,
Division 1,
Department A.
Jan. 7, 1975.
Rehearing Denied Feb. 18, 1975.

After case, which had originally been removed to federal court, had been remanded to state court for lack of federal jurisdiction, the Superior Court, Maricopa County, Cause No. C196753, Howard F. Thompson, J., set aside certain stipulations entered into between the parties in federal district court and dismissed defendants' counterclaims based thereon and defendants appealed. The Court of Appeals, Stevens, J., held that where the stipulations specifically stated that they were entered into in view of directed verdicts granted in federal district court against plaintiffs and were entered into without prejudice to plaintiffs' right to challenge federal jurisdiction, state trial court properly refused to enforce the stipulations once the case was remanded to state court and properly dismissed the counterclaims based thereon; and that, in view of duress which was occasioned by the directed verdicts, no contract between the parties was entered into so that plaintiffs were entitled to return amounts received pursuant to the terms of the stipulations and to seek to avoid the stipulations.

Affirmed.

1. **Stipulations** ⇐13, 17(1)

Generally, parties are bound by their stipulations unless relieved therefrom by the court.

2. **Stipulations** ⇐1

"Stipulation" is an agreement, admission or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect to some matter incident thereto, for the purpose, ordinarily, of avoiding delay, trouble and expense.

See publication Words and Phrases for other judicial constructions and definitions.

3. **Stipulations** ⇐14(1)

In construing stipulations, primary rule is to ascertain and give effect to the intention of the parties and the stipulation must be construed in the light of the circumstances surrounding the parties and in view of the result which they were attempting to accomplish.

4. **Stipulations** ⇐13, 19

Where stipulation for judgment was entered into in federal district court after court had directed verdicts against plaintiffs on all but one claim and where plaintiffs reserved the right to contest jurisdiction of the federal court, state court, after federal court had been found to be without jurisdiction and case had been remanded to state court, properly refused to enforce the stipulations and properly dismissed them in the form of defendants' counterclaims.

5. **Stipulations** ⇐13

Court, in exercise of its own discretion, may set aside a stipulation entered into through inadvertence, excusable neglect, fraud, or mistake of fact or law, or where the facts stipulated have changed or there has been a change in underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation.

6. **Contracts** ⇐15

To find the existence of a contract, court must find that the two parties freely consented to make a contract.

7. **Stipulations** ⇐13

Where stipulations provided that they were entered into on part of plaintiffs because of federal district court's action in

directing verdicts against plaintiffs, the stipulations were obtained under the duress of the directed verdicts and no contract was entered into between the parties so that plaintiffs, after federal court was found not to have jurisdiction and case was remanded to state court, could return amounts received under the terms of the stipulations and have the stipulations set aside.

Evans, Kitchel & Jenckes, P. C., by Newman R. Porter and F. Pendleton Gaines, III, Phoenix, for appellants

Lewis & Roca by John P. Frank, Gerald K. Smith and Richard N. Goldsmith, and Flynn, Kimerer, Thinnes & Galbraith by John J. Flynn, Phoenix, for appellees

OPINION

STEVENS, Judge

This appeal is to review the decision of the trial court not to accept two stipulations entered into between the parties while litigating their case in federal court. Harsh Building Company and the other appellants (Harsh Building) were the defendants in an action commenced in the State court on 31 January 1967. On 3 February 1967, the case was removed to the United States District Court for the District of Arizona on the basis of diversity of citizenship. Following six years of federal court proceedings which included a trial and two appeals, the case was remanded to the State court for lack of federal jurisdiction, see Bialac v. Harsh Building Co., 463 F.2d 1185 (9th Cir. 1972). On 31 May 1973, Harsh Building filed an answer and counterclaim[1] in the Superior Court of Arizona for Maricopa County. Sam Bialac and the other appellees (Bialacs) made a motion to dismiss several counterclaims of Harsh Building. In a judgment entered 8 April 1974 the trial court dismissed counterclaims A and B. The trial court made an express finding that there is no just reason for delay and expressly directed the entry of judgment, thereby making this judgment a final, appealable judgment. Rule 54(b), Rules of Civil Procedure, 16 A.R.S.

The detailed recitation of the facts of this dispute is not necessary to our decision and, especially due to the incompleteness of the record before us,[1] we quote appellants' brief for a short statement of facts:

> "The parties' disputes center around a large apartment complex and adjacent shopping center located in Phoenix. At one time, the property was owned by a corporation controlled by plaintiffs (*referred to hereinafter simply as the Bialacs'*). This complex litigation arises from the Bialacs' desire and efforts to convert the rental apartments into FHA 234' condominium units during the period from 1965 through 1967. Without unnecessary detail, it is sufficient to note that the complicated, intricate series of contractual arrangements between the parties arose from the Bialacs' wish to avoid being taxed on the proceeds of the condominium conversion at ordinary-income rates. The Bialacs sought to achieve favorable capital gains treatment of the sales and proceeds and at the same time preserve the benefits of FHA financing."

The case was pending in the federal court for several years while both parties filed numerous pleadings, motions and engaged in extensive discovery. In May and June, 1971, the litigants participated in a five-week jury trial. Towards the end of their case, the Bialacs made an oral motion to remand the case to the State court based on an incomplete diversity of citizenship alleging that Harsh Building, an Oregon corporation had its principal place of business in Arizona. The motion to remand was denied. The Court, a few days later, directed verdicts in favor of Harsh Building on seven of eight counts of the Bia-

1. The record of proceedings in the federal court has not been transmitted to the Superior Court upon remand.

lacs' complaint. The case was in this posture when the parties entered into and filed a second stipulation entitled "Stipulation for Judgment, Dismissal and Other Disposition of Certain Claims." This stipulation settled the major portion of the case and it settled and disposed of the remaining count of the Bialacs' complaint as well as Harsh Building's counterclaims. This stipulation incorporated by reference a 13 March 1970 stipulation entitled "Stipulation and Order Re Disposition of Certain Claims."

Subsequently, the Ninth Circuit Court of Appeals determined that the federal court lacked jurisdiction and remanded with directions to send the case back to the State court. Once in the Maricopa County Superior Court, Harsh Building sought the enforcement of the two stipulations by incorporating them as counterclaims A and B in their answer. Upon the motion of the Bialacs, the trial court dismissed counterclaims A and B. Harsh Building appealed this decision. The question for review is: As a matter of law, is an agreement to settle claims in litigation rendered invalid because the agreement is evidenced by a stipulation filed in a court later determined to lack jurisdiction?

[1] The general rule is that the parties are bound by their stipulations unless relieved therefrom by the court. Higgins v. Guerin, 74 Ariz. 187, 245 P.2d 956 (1952); Guard v. County Of Maricopa, 14 Ariz. App. 187, 481 P.2d 873 (1971). The parties could not direct us to any case directly on point nor did our research reveal any. We must find the general rules and apply them to the present dispute to find a solution.

[2, 3] "A stipulation is an agreement, admission or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect to some matter incident thereto, for the purpose, ordinarily, of avoiding delay, trouble and expense." Bekins Van & Storage Company v. The Industrial Commission Of Arizona, 4 Ariz. App. 569, 570, 422 P.2d 400, 401 (1967). In some cases, it is also a wise trial strategy to enter into a stipulation to save what may be saved when one party seems to be prevailing in the dispute. In construing stipulations, the primary rule is to ascertain and give effect to the intention of the parties and the stipulation must be construed in light of the circumstances surrounding the parties and in view of the result which they were attempting to accomplish. Gear v. City Of Phoenix, 93 Ariz. 260, 379 P.2d 972 (1963).

[4] As we have stated, the second stipulation, dated 15 June 1971, incorporated the first stipulation of 13 March 1970. We now quote paragraph seven of the second stipulation which states the reason for, as well as provides an insight of the intent of the parties in entering the stipulation.

> "7. This stipulation is prepared and entered into in light of the fact that the Court has directed verdicts against the plaintiffs on all but one of the claims contained in the Fourth Amended Complaint. Plaintiffs reserve, without prejudice of any kind, the right to appeal from the judgment as to each of these claims (except as to the stipulated dismissal of Count Five) and to contest by appropriate means, whether appeal or otherwise, the jurisdiction of this Court."

The above quote, we believe, clearly reflects the Bialacs' reason for agreeing to the stipulation. The District Court directed verdicts against them on all but one of their claims. This is a persuasive and compelling reason for entering a stipulation to make the best of a seemingly hopeless situation. Their reason for wanting to nullify the stipulation is also evident. The Bialacs are back in the State court and are presented with an opportunity to pursue their claims anew. A stipulation is an agreement between the parties and ordinarily, we would not hesitate to enforce a stipulation regardless of whether it was made while the parties were litigating in the federal or state court. The stipulations in question were clearly entered into in view of the posture of the case as it then

existed and it would be inappropriate to hold the parties to these stipulations now, when the parties are back in the position from whence they started.

[5] The Bialacs also reserved the right to contest the jurisdiction of the federal court. If this stipulation was to have effect in any other court, it would have been an idle gesture to reserve the right to contest the jurisdiction of the court. It would have made little, if any, difference as to which court would enter a consent judgment based on a set of stipulations that set out in detail the amount of the judgment. For these two reasons, we find that the trial court had adequate cause for refusing *to enforce the stipulations and dismissing* them in the form of counterclaims A and B.

> '[T]he court, in the exercise of its sound discretion, may set aside a stipulation entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation." Los Angeles City Sch. Dist. v. Landier Management Co., 177 Cal.App.2d 744, 2 Cal.Rptr. 662, 665–666 (1960).

The effect of the motions to dismiss counterclaims A and B was a request by the Bialacs to be relieved of their stipulations in view of the drastic change of the circumstances. By the granting of the motions the Superior Court Judge ruled that under the circumstances the Bialacs should be so relieved. We find no abuse of discretion in this ruling.

Harsh Building asserts that these stipulations are in the nature of a contract and should be enforced as such. They point to the fact that Harsh Building made a cash payment of $13,000 to the Bialacs as consideration under the terms of the stipulation. The Bialacs after the determination of the appeal, attempted to return the $13,000 paid to them but Harsh Building refused to accept it.

[6, 7] To find the existence of a contract, we must find that the two parties freely consented to make a contract. It would be hard to argue that the Bialacs, faced with the directed verdicts against them in all but one claim, freely consented to the contract. We believe that the Bialacs' consent to the stipulation was obtained under the duress of the directed verdicts. This is evidenced by paragraph seven of the stipulation where the Bialacs reserved the right to appeal from the judgments and to contest the jurisdiction of the court. We cannot, in good conscience, enforce the stipulation as a contract.

The decision of the trial court to dismiss counterclaims A and B is based upon good cause. It is affirmed.

OGG, P. J., Department A, and DONOFRIO, J., concur.

22 Ariz.App. 594

Jesus FIGUEROA, Petitioner,

v.

The INDUSTRIAL COMMISSION of Arizona, Respondent,

New Pueblo Construction Co., Respondent Employer,

Employers Mutual Liability Insurance Company of Wisconsin, Respondent Carrier.

Nos. 1 CA-IC 1019, 1 CA-IC 1020.

Court of Appeals of Arizona,
Division 1,
Department C.

Dec. 24, 1974.

Rehearing Denied Jan. 13, 1975.

Review Granted Feb. 25, 1975.

Workman, whose benefits for left inguinal hernias suffered in January 1971 and in January 1972 had been terminated, Claim Nos. 1-07-47 and 2/0-27-37, petitioned for certiorari to review the In-

Gerald E. HIGLEY and Ruth J Higley, husband and wife, Plaintiffs and Appellants,

v.

A. Cardon McDONALD and Dollie McDonald, husband and wife, Defendants and Respondents.

No. 18755.

Supreme Court of Utah

April 27, 1984

Plaintiffs brought action in ejectment to secure removal of defendants' mobile home from real property allegedly owned by plaintiffs The Seventh District Court, Carbon County, Boyd Bunnell, J , entered judgment of no cause of action against plaintiffs, and plaintiffs appealed The Supreme Court, Hall, C J , held that parties' stipulation that deed survey depicted approximate location of the mobile home did not bind trial court to apply measurements and calculations on the deed survey in determining location of disputed boundary

Affirmed.

1. Stipulations ⇐17(1)

Stipulations are conclusive and binding on parties unless, upon timely notice and for good cause shown, relief is granted therefrom

2. Stipulations ⇐17(3)

In action in ejectment to secure removal of defendants mobile home from real property allegedly owned by plaintiff parties stipulation that deed survey depicted approximate location of the mobile nome did not bind trial court to apply measurements and calculations on the deed survey in determining location of disputed boundary

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James W Guthrie, Hansen, Thompson & Dewsnup, Salt Lake City, for plaintiffs and appellants

Duane A Frandsen, Michael R Jensen, Frandsen, Keller & Jensen, Salt Lake City, for defendants and respondents

HALL, Chief Justice

Plaintiffs brought this action in ejectment to secure the removal of defendants' mobile home and other personal property from real property allegedly owned by plaintiffs The district court sitting without a jury, entered judgment of no cause of action against plaintiffs We affirm

In 1951, Arthur Bolotas (hereinafter 'Bolotas') purchased a tract of mountain land located along the eastern shoreline of Scofield Reservoir in Carbon County, Utah In terms of its legal description, the property is situated within the southeast quarter of Section 4, Township 12 South, Range 7 East, Salt Lake Base & Meridian

In 1960, Bolotas hired John Bene (hereinafter 'Bene'), a licensed surveyor, to survey and plat out a portion of the shoreline property for development as a mountain home subdivision Bene surveyed the land into lots and blocks and set survey markers (drill steel) at the corners of the lots He tied his survey to a point established by him as the northeast corner of the southeast quarter of the southeast quarter of Section 4 This point was determined by locating the survey markers representing the northeast corner and the east quarter corner of Section 4 and then, through the use of survey equipment, by extending an imaginary line through those two points and to the south thereof a distance of 1,320 feet (standard 40-acre distance) A steel pin was placed at this point by Bene as a survey marker

Bene testified in respect to the northeast corner and east quarter corner reference points that he found the former point marked, as most sectional corners typically are by an authentic brass cap placed by government surveyors, while the latter point was marked by a 3/4-inch bent steel rod, which was shown to him by an adjoining landowner Justice Seeley This latter point has been denominated the 'Seeley Corner"

After completing his survey of the Bolotas property, Bene prepared a subdivision plat (hereinafter "Bolotas Plat") from the data obtained in the survey. Bolotas postponed recording the plat until the remaining portion of his property could be surveyed and included in the plat. However, the remainder of the property was never surveyed and subdivided, and thus the plat was never recorded.

In 1969, plaintiffs Gerald and Ruth Higley and defendants Cardon and Dollie McDonald (hereinafter referred to in the singular as plaintiff and defendant) purchased two adjoining lots in the Bolotas Subdivision. The lot purchased by plaintiff was designated on the Bolotas Plat as Lot 26 Block 1 and was situated to the south of defendant's lot, which was designated as Lot 27 Block 1.

At the time the parties negotiated the purchase of their respective lots, the only descriptions they had of the lots were the "lot and block" descriptions indicated on the Bolotas Plat. Aside from that, the parties could see the physical monuments at the corners of the lots (set previously by Bene) and could determine therefrom the sizes and locations of the lots. There appears to be no inconsistency between the lot dimensions and locations as depicted on the Bolotas Plat and as represented by the physical monuments.

The deeds to Lots 26 and 27 were prepared by attorney Luke Pappas (hereinafter "Pappas"). Inasmuch as the Bolotas Plat was not of record at the time the deeds were prepared, Pappas described the subject lots by metes and bounds descriptions. However, in anticipation that the plat would be recorded in the future and to facilitate future references to specific lots in the subdivision, Pappas included with the metes and bounds descriptions the lot and block numbers as set forth on the plat.

Pappas testified that the metes and bounds descriptions contained in plaintiff's and defendant's deeds were calculated from the dimensions on the Bolotas Plat. Notwithstanding, he also testified that the metes and bounds descriptions were at variance with the lot and block dimensions on the Bolotas Plat in that the former represented the location of the lots to be 40 feet farther to the north than the latter. This discrepancy, according to Pappas, resulted from the circumstances described hereafter: Following a conveyance from Bolotas to one Jouflas of four lots located in the same block (Block 1) as, and just south of, Lots 26 and 27, Bolotas informed Pappas that he (Bolotas) had measured (apparently onsite) a section of Block 1 and had found that approximately 40 feet more land existed in that block than was included in the plat dimensions. Based on this measurement, Pappas drew up a description extending the northern boundary of Block 1 an additional 40 feet. He subsequently used that description as a reference in preparing the metes and bounds descriptions on plaintiff's and defendant's deeds. Sometime thereafter, Pappas made an on-site measurement himself and discovered that the additional 40 feet did not exist and that the actual dimensions of Block 1 and the lots included therein were precisely as they are recorded on the Bolotas Plat. He therefore concluded that the metes and bounds descriptions in plaintiff's and defendant's deeds, containing the additional 40 feet of land, were in error. Unfortunately, this error was never corrected, or even revealed, prior to the institution of this lawsuit.

In 1970, plaintiff Gerald Higley, with the assistance of defendant Cardon McDonald, surveyed the north-south boundary line between their respective properties and set stakes along that line in preparation of moving their mobile homes onto their lots. Shortly thereafter, the parties moved their mobile homes onto their lots, positioning them within the staked areas.

In 1971, plaintiff informed defendant that defendant's mobile home was encroaching onto plaintiff's lot due to an error they had made in their 1970 survey. Defendant responded by contacting Bene and requesting his services in settling the dispute. In 1972, Bene surveyed the boundary between the two lots, using as

reference points the drill steel survey markers he had set at the corners of the lots in his original 1960 survey, and determined that defendant's mobile home was overlapping the boundary line and encroaching 10 to 12 feet onto plaintiff's lot. Thereafter (during that same year), defendant moved his mobile home a distance of 10 to 15 feet to the north. Plaintiff witnessed the moving of the trailer and expressly conceded to the adequacy thereof.

After defendant's mobile home had been relocated, Bene again made an on-site inspection and survey of defendant's lot and determined therefrom that defendant's mobile home was no longer encroaching on plaintiff's lot and that said mobile home was positioned entirely within the bounds of defendant's lot, as that lot was established by Bene in his original (1960) survey and as it appears on the Bolotas Plat.

Since the 1972 reestablishment of the boundary line between Lots 26 and 27, the parties have planted trees along that line, and the power company has placed a utility pole on the same

In 1977, plaintiff once again informed defendant that his (defendant's) mobile home was encroaching on plaintiff's property Plaintiff's claim was purportedly based upon a survey performed by a Mr Spensko in 1974 or 1975 Defendant rejected this claim and refused to move his mobile home again. This action ensued.

The trial court observed that the metes and bounds descriptions included in the deeds to Lots 26 and 27 were inconsistent with the lot and block descriptions also included therein. The court ruled that the inclusion of inconsistent legal descriptions within the subject deeds rendered those deeds ambiguous. As a result, parol evidence was allowed to clarify the intent of the parties and their common grantor (Bolotas) as to the dimensions of the two lots in question, as well as the location thereof.

At the conclusion of the presentation of evidence, the trial court ruled that the parties intended to purchase Lots 26 and 27, and Bolotas intended to convey the same, in accordance with the lot and block dimensions on the Bolotas Plat. In addition, the court found that the lots occupied and possessed by the parties at that time had the same dimensions (square footage) and were in the approximate location as the lots (i e., Lots 26 and 27) depicted on the Bolotas Plat. It was therefore concluded that defendant's mobile home was not encroaching on plaintiff's lot, but was situated within the boundaries of defendant's own lot.

Plaintiff's sole contention on appeal is that the measurements and calculations indicated on the Bolotas Plat relative to Lots 26 and 27 do not support the foregoing conclusion. He maintains that he proved at trial by stipulated evidence that defendant's mobile home encroaches approximately 30 feet onto his (plaintiff's) land as calculated and measured from the Bolotas Plat.

The stipulated evidence referred to by plaintiff is a diagram of Lots 26 and 27 produced by Bene in 1981, during the pendency of this lawsuit. Said diagram (hereinafter referred to as the "deed survey") illustrates the location of defendant's mobile home in relation to Lots 26 and 27, using the metes and bounds descriptions contained in plaintiff's and defendant's deeds According to the deed survey, defendant's mobile home encroaches across the full 40- to 45-foot north-south width of plaintiff's lot (i.e , Lot 26).

Plaintiff does not, however claim that the encroachment extends the full 40 to 45 feet indicated on the deed survey He observes that the metes and bounds descriptions in the deeds erroneously represent the location of the disputed boundary line as being 15 feet farther to the north than it actually measures on the Bolotas Plat. From this observation, he concludes that the southern boundary of defendant's lot is actually located 15 feet farther to the south than is shown on the deed survey, and thus the encroachment measures only 30 feet rather than the full 45 feet (i.e., 45 less 15).

The premise for plaintiff's argument that the measurements on the Bolotas Plat establish a 30-foot encroachment is the belief that the metes and bounds descriptions on

the deeds, from which the deed survey was taken, are consistent with the lot and block measurements on the Bolotas Plat. This premise, however, is false. The inconsistency between the metes and bounds descriptions and the Bolotas Plat measurements has heretofore been shown through the testimony of the attorney who prepared the metes and bounds descriptions, namely Luke Pappas. Pappas testified that he included in the metes and bounds descriptions an extra 40 feet of ground that did not appear on the Bolotas Plat and that he later determined to be in error. It was his opinion that the 40-foot overage had been incorporated into the deed survey and was therefore responsible for the encroachment shown on that survey.

The testimony of Luke Pappas with respect to the 40-foot overage was corroborated by a draftsman named Martin Smart, who was commissioned during the pendency of this action to sketch the various lots in Block 1, including Lots 26 and and 27, according to the metes and bounds descriptions in the respective deeds His survey confirms the conclusion drawn by Pappas that an approximate 40-foot discrepancy exists between the representations on the Bolotas Plat of the location of the Block 1 lots and the representations in the metes and bounds descriptions of the same.

The evidence in this case, particularly that discussed above, supports the trial court's determination that the measurements and dimensions on the Bolotas Plat relative to Lots 26 and 27 establish the location of defendant's mobile home as being entirely within the boundaries of defendant's lot and therefore not encroaching on plaintiff's lot.

Furthermore, as to plaintiff's observation that only a 15-foot variance exists between the metes and bounds dimensions and the Bolotas Plat dimensions, the evidence stated above supports the conclusion that the variance was more than just 15 feet and that it was approximately 40 feet.

[1] Having considered the evidence (i.e., deed survey) alleged to have been entered upon stipulation by the parties, we now turn our attention to the merits of the stipulation itself In his appellate brief, plaintiff's version of this stipulation is as follows:

> The parties stipulated that the survey [deed survey] accurately represented the location of the appellants and respondents' property as described in the respective deeds, and that respondents' 60-foot mobile home is accurately depicted on the survey in relation to the deed descriptions, and that it is actually located on the face of the earth in the place depicted in Exhibit 3 [deed survey].

He points out that the well-settled rule with respect to stipulations such as this is that they are conclusive and binding on the parties unless, upon timely notice and for good cause shown, relief is granted therefrom. He further indicates that the rule precludes the adoption of findings in conflict with stipulated facts [1]

[2] While plaintiff accurately cites the rules in this regard, we do not adopt his characterization of the stipulation. According to the record, the extent to which the parties stipulated respecting the deed survey was that it could be admitted into evidence and that it depicts the "approximate" location of defendant's mobile home. We cannot agree that the effect of this stipulation was to bind or obligate the trial court to apply the measurements and calculations on the deed survey in determining the location of the disputed boundary

Plaintiff has failed to demonstrate error. Affirmed. Costs to defendant.

OAKS, HOWE and DURHAM, JJ., and J. DENNIS FREDERICK, District Judge, concur.

STEWART, J., does not participate herein; FREDERICK, District Judge, sat.

1. *First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, Utah, 600 P 2d 521 (1979), *State v. Bailey* 3 Utah 2d 254 282 P 2d 339 (1955).

conclusion that the minimal terms of a contract, *under the law*, were present here.

There is nothing here indicating the amount of material agreed upon, the time within or during which performance is required. It was as compatible with perpetuity, as with a definitive hour-glass measurement. The provision here as to performance "if and when the option is exercised," is vulnerable to a similar contractual deficiency. the provision that "This option is for the purpose of establishing the price," seems meaningless without a recitation of the amount of material agreed upon,—absent here, or, again, a recitation of the time for payment. The "special conditions affecting the availability" of the materials,—unresolved but seemingly determinable in futuro, almost reaches the assumption that it is an agreement to agree, failing which, none exists. The statement that the agreement shall *not* be construed as a *sole* or *prior* right to the materials leads one to conclude that Ogden could have sold not only the "materials" but the fee at any time before a firm contract was born,—which certainly was no fait accompli here. the provisions about arrangements to be made for occupancy or removal and stipulations for work areas and 'any other pertinent agreements" shall be made *before* entry to remove material is accomplished in futuro, surely does not lend itself to the basic concept under obligation of contract's principles that the terms must be certain.

As to the facts recited, those mentioned in plaintiff's brief are accurate enough, but by and large, are most favorable to plaintiff's contention Other believable facts either discount some that are stated in favor of plaintiff or lead to a reasonable refutation, or at least to an entirely different scenario They would appear to be of the type looking to the supplying of terms found *missing* in the instrument,—not in explaining *confused* terms contained therein. Such procedure would seem to be unacceptable in evidentiary areas.

We believe that on top of the correctness of the trial court's analysis of the terms of the 'option," there is ample, believable, competent and admissible evidence that if believed by the court, as seems to be the case here, make inescapable the requirement that we do anything else but affirm under the accepted rules.

Since we conclude that the trial judge was correct in his deliberation both as to the law and the facts, to the effect there was no binding contract, we believe and conclude that the other points on appeal—II, as to estoppel, III, IV and V re breach and VI, relating to damages—are moot and that VII, to the effect that the Court failed to make certain findings and those made were insufficient to support the judgment, is without merit, and that VIII, with respect to the matter of filing for costs, may be determined by the lower court.

ELLETT, CROCKETT, TUCKETT and MAUGHAN, JJ., concur.

Robert D. KLEIN, Plaintiff and Appellant,

v.

Mary Avalon KLEIN, Defendant and Respondent.

No. 13994.

Supreme Court of Utah.

Dec 16 1975

From supplemental decree of the Third District Court, Salt Lake County, G. Hal Taylor, J, adjusting financial and property interest of parties to divorce proceeding, husband appealed. The Supreme Court, Crockett, J, held that entry of such a supplemental decree after original decree in divorce proceeding had been affirmed

was proper, that issue whether husband had agreed to and should be bound by stipulation with regard to division of property was for District Court and that even if husband did not understand and/or was subject to duress in agreeing to stipulation or if his agreement to stipulation was timely and properly withdrawn, an award in accordance with stipulation was not an abuse of discretion.

Affirmed.

Maughan, J., dissented and filed opinion.

1. Divorce ⇐172

Under usual circumstances, same matters cannot be litigated anew subsequent to a definite and final judgment and decree in a divorce action.

2. Divorce ⇐254

Entry of supplemental decree adjusting financial and property interest of parties after original decree in divorce proceeding had been affirmed was proper where original decree contained the reservation that 'The court further retains limited jurisdiction if within one year either party proves to be suffering serious financial distress because of this decree based on decisions and ensuing development arising therefrom not capable of evaluation and effect at this time, the court will review its ruling" and where case involved substantial property interests and complex financial situation.

3. Stipulations ⇐13

Same rules apply to binding parties to stipulation as apply to any other agreement; if there is any justification in law or equity for avoiding or repudiating stipulation, and party timely does so, he is entitled to be relieved from it, otherwise not.

4. Divorce ⇐286(1)

In divorce proceeding in which supplemental decree adjusted financial and property interests of parties, in accordance with stipulation, issue whether husband had agreed to and should be bound by stipulation was for trial court.

5. Divorce ⇐249(2), 297

Though a stipulation pertaining to matters of divorce, custody and property rights therein is advisory on court and will usually be followed, such a stipulation is not necessarily binding on court, it is only a recommendation to be adhered to if court believes it to be fair and reasonable.

6. Divorce ⇐249(2)

Even if divorced husband did not understand and/or was subjected to duress in agreeing to stipulation with regard to division of spouses' financial and property interests or if his agreement to stipulation was timely and properly withdrawn, trial court could have considered that which was proposed as a stipulation and that which was said by spouses and their counsel about the stipulation, as part of total facts and circumstances on which to fashion a just and equitable decree.

7. Divorce ⇐252

Even if divorced husband did not understand and/or was subjected to duress in agreeing to stipulation with regard to division of spouses' financial and property interests or if his agreement to stipulation was timely and properly withdrawn, an award in accordance with stipulation was not an abuse of discretion where, under such award, husband received about $200,000 more than he would have received under trial court's judgment under which property with net value of $931,502.63 and $743,387.35 would have been awarded to husband and wife respectively

Orrin G. Hatch, of Hatch & Plumb, Salt Lake City, for plaintiff-appellant.

Robert S. Campbell, Jr., and James P. Cowley, of Watkiss & Campbell, Salt Lake City, for defendant-respondent

CROCKETT, Justice.

This appeal is sequel to *Klein v. Klein*, 30 Utah 2d 1, 511 P.2d 1284. It attacks a supplemental decree of the district court which adjusted the financial and property interests of the parties.

[1, 2] The plaintiff's first line of attack is that the district court having rendered *its judgment in May 1972 and that judgment* having been affirmed by this court in July 1973, it became final and absolute and that the trial court could not properly change or modify that decree except for subsequent change in circumstances The correctness of that proposition under usual circumstances and as applied to a definite and final judgment and decree in a divorce action, to the end that the same matters cannot be litigated anew, is acknowledged [1] However, from what is said below, it will be seen that that is not the type of decree we are concerned with here

Other basic facts are set forth in the prior decision It is material here to recite only that these parties were married in 1953 that they became the parents of three children, that the plaintiff has a net income of about $24 000 per year that the defendant has an earning capacity of about $3 600 per year but is presently unemployed and that the court awarded $300 per month alimony and $100 support money for each child

None of the foregoing facts is in controversy here. The dispute is over division of very substantial assets and property which had been built up during the marriage

In the original divorce case the trial judge found their total net worth to be $225,000 and attempted to award defendant about one half by giving her the family home, valuing it at $103,000 plus a Chevrolet, and the proceeds from the sale of four lots, valued at about $6,000 But it is apparent from the findings and decree that the court was not entirely satisfied with the arrangement arrived at So instead of making a definite and final disposition thereof he included this somewhat unusual provision as the final paragraph of the decree

> The court further *retains limited jurisdiction* it within one year either party proves to be suffering serious financial distress because of this decree based on *decisions and ensuing developments arising* therefrom *not capable of evaluation and effect at this time the court will review its ruling* and determine whether modification should be made

On review of the case on appeal, this court also had apprehensions about the valuation of the property and the allocation thereof but decided not to wrestle with that controversy because of the reservation in the decree just recited, which would give the trial court a further opportunity to deal with that situation This is shown by the following language from the decision

> The Judge who tried this case has retired and another Judge will hear any future matters
>
> If the Decree causes financial distress, the ruling made can be reviewed it within *one year after final judgment either* party requests it
>
> Another possible reason for having the matter looked at within a year is the distribution of the assets
>
> The decision of the Court *was based upon an assumption* that the net value of the assets of the plaintiff was $225 000 - 00
>
> Having confidence in the integrity of our trial courts and the ability of the judge to review the matter it presented to them *we affirm the judgment rendered and leave it to the lower court to determine if a modification should be* made

After the remand the defendant, on October 25 1973 filed a 'Petition for Review of Economic Matters and Modification of the Decree' supported by affidavits and proffer of proof In connection with an order to show cause issued thereon the trial court [2] indicated his view that under the prior decree and the decision of this

1 *Osmus v. Osmus*, 114 Utah 216, 198 P.2d 233, *Gale v. Gale* 123 Utah 277, 258 P.2d 986.

2 This order was entered by Hon. James Sawaya and the subsequent proceedings and the amended decree appealed from were handled by Hon. G. Hal Taylor

court it was his conclusion that "serious financial distress is a relative matter" and that whether the defendant was so distressed could not be determined without reviewing the whole economic situation of these parties.

If we look at the total situation, including the substantial property interests and the complex financial situation of these parties, together with the facts that the original decree did not purport to make the usual final disposition thereof, but contained the reservation recited above, we see nothing unreasonable or improper in the just stated conclusion of the trial court. The circumstances here distinguish this case from those relied on by plaintiff which hold that a final decree cannot be modified except for a change of circumstances. Moreover, in this situation we see no reason why the court in its effort to do equity between these parties could not make whatever corrections or adjustments in the decree it deemed necessary to carry out that purpose.

Consistent with that objective, there followed extensive discovery procedures, and a hearing of several days' duration, at which both parties presented extensive evidence and the testimony of experts on valuations; and thereafter submitted their respective memorandums and proposals as to the disposition to be made of their financial affairs. Consequent thereto, the trial court on November 11, 1974, made findings that the value of the assets was $2,037,535.63, less liabilities of $288,725.65, with a resulting net worth of $1,748,809.98. Of this it awarded to the plaintiff properties valued at $1,121,471.63, required him to discharge obligations of $189,869, thus giving him properties of net value $931,602.63. To the defendant he awarded properties valued at $842,144, required her to discharge obligations of $98,856.65, a net award to her of $743,387.35.

Four days after the November 11, 1974, supplemental decree, plaintiff filed his objections thereto and motions for other relief and/or a new trial. A hearing on these motions began on Friday, December 6, 1974, and continued on Monday, December 9. During the noon recess respective counsel engaged in discussions and apparently arrived at terms of settlement based on an offer of the defendant. When court convened at 2:00 p. m. defendant's counsel orally stated into the record the terms thereof, which involved reference to certain paragraphs of the November 11, 1974, judgment.

Inasmuch as it is the position of the plaintiff that he repudiates the stipulation, the following is noteworthy. A part of the record, relied upon by him in support of his position, is:

> THE COURT: All right. Mr. Klein, you have heard your counsel read into the record, part of it by reference to paragraphs. I don't know whether you have been able to follow it or not.
>
> MR. KLEIN: I haven't followed it, Your Honor.
>
> THE COURT: Do you understand it?
>
> MR. KLEIN: I am relying on my counsel. At this point, I haven't been able to read it.

As opposed to the foregoing, a part of the record upon which the defendant places reliance is the following response of the plaintiff which occurred later:

> By way of the record, I accept the stipulation and I so understand. Spoken by Robert D. Klein.

Speaking in generality, the offer made on the defendant's behalf which was then agreed to by the plaintiff and his counsel reduced the properties being awarded to the defendant in the amount of about $200,000 and increased the value of properties being awarded to the plaintiff in that amount. Subsequent thereto, on December 18, 1974, the trial court made further findings and entered a decree in conformity with the stipulation, and from which this appeal is taken.

Plaintiff's arguments that he should not be bound by the stipulation are: that he

did not understand the goings-on at the time it was presented to the court that it was his impression that he was obliged to indicate agreement so that negotiations could continue and that the stipulation would be reduced to writing for his examination before it was confirmed and relied on but that the next day, when he realized what had been done, he immediately notified his counsel, who in turn notified opposing counsel and the trial court that he would not so agree and that this was done before the amended order was entered.

[3] Plaintiff advances the proposition that it would be neither fair nor proper to enter a "consent decree" purporting to be based on the agreement of a party who does not agree thereto at the time of final submission to the court This appears to be a sound proposition when applied to appropriate circumstances[3] But it is also true that the same rules apply to binding parties to such an agreement as apply to any other agreement. If there is any justification in law or equity for avoiding or repudiating a stipulation, and he timely does so, he is entitled to be relieved from it, otherwise not

[4] Proceeding beyond what has just been said, we make several observations about this stipulation the first is that the issue as to whether plaintiff agreed to and should be bound by the stipulation was one of fact for the trial court to determine and it was not convinced that the plaintiff did not understand and voluntarily agree to the stipulation

[5 6] This would seem to sufficiently settle the issue But even if it be assumed, as the plaintiff contends, that he either did not understand and/or was subjected to duress in agreeing to the stipulation, or that his agreement was timely and properly withdrawn, these further observations are applicable It is the established rule that a stipulation pertaining to matters of divorce custody and property rights therein, though advisory upon the court and would usually be followed unless the court thought it unfair or unreasonable, is not necessarily binding on the court anyway It is only a recommendation to be adhered to if the court believes it to be fair and reasonable[4] In addition to all of the foregoing, there is no reason that the trial court cannot consider what was proposed by the parties as a stipulation, and what was said by them or their counsel about it, as part of the total facts and circumstances upon which to fashion what in his judgment is a just and equitable decree

[7] Under the circumstances shown, particularly the fact that upon his analysis of the total circumstances the court indicated in his judgment of November 11, 1974 that the defendant should have $200,000 more in assets than the present decree gives her and the plaintiff $200,000 less it is obvious that the trial court did not regard this latter allocation of assets as in any degree unjust or inequitable to the plaintiff Consistent with the latitude of discretion necessarily allowed to the trial judges in dealing with problems of the character here involved, we are not persuaded that we should disturb the decree[5] (All emphasis herein added)

Affirmed Costs to defendant (respondent)

HENRIOD C J, ELLETT, and TUCKETT JJ concur

MAUGHAN, Justice (dissenting).

3 See *Burnaman v Heaton* 130 Tex 333 240 S W 2d 288 *Van Donselaar v Van Donselaar* 249 Iowa 504, 87 N W 2d 311 (1958)

4 *Openshaw v Openshaw* 102 Utah 22 126 P 2d 1068 *Callister v Callister* 1 Utah 2d 34, 261 P 2d 944

5 See *Pinion v Pinion* 92 Utah 255 67 P 2d 265 *MacDonald v MacDonald* 120 Utah 573 236 P 2d 1066 *Wiese v Wiese*, 24 Utah 2d 236 469 P 2d 504.

2 Utah 2d 423

Blanche Zollinger MADSEN, Appellant,

v.

Delbert Murray MADSEN, Respondent.

No. 8151.

Supreme Court of Utah.

Nov. 30, 1954.

Wife's action for divorce, wherein parties stipulated for $30 per month support money for each child and $1,000 cash in lieu of alimony. From a decree of the First Judicial District Court, Cache County, Lewis Jones, J., awarding $25 per month for each child and one-half interest in about fifty acres of land instead of the agreed $1,000 cash, the wife appealed. The Supreme Court, Henriod, J., held that the trial court's departure from the provisions of the stipulation was not, under circumstances of the case, such an abuse of discretion as to warrant reversal.

Remanded for proceedings consistent with opinion.

Worthen, J., dissented in part.

1. Stipulations ⇐17(3)

Trial court in divorce matters, wherein state is interested party, need not necessarily abide with terms of litigants' stipulations but such stipulations should be respected and great weight given thereto.[1]

2. Divorce ⇐286, 312.6(4)

Alimony and support money provisions of trial court's divorce decree could not be disturbed on review in absence of clear abuse of discretion.[2]

3. Divorce ⇐236, 297

Under circumstances shown in divorce case, trial court's award of $25 per month support money for each of three children and of one-half interest in about fifty acres of land as alimony, in lieu of $30 per month for each child and $1,000 cash as alimony as provided by stipulation of parties, was not such abuse of discretion as to warrant reversal.

4. Divorce ⇐301

Divorce decree permitting visitation by defendant father and permitting him to take young children from custody of mother periodically should be supported by clear, affirmative and guaranteeing evidence that welfare of children will not be jeopardized by execution of order.

5. Divorce ⇐312.7

Where divorce decree permitting defendant father to take children of tender years from custody of mother once each month for two days was not supported by evidence as to how children would be clothed, housed, fed and otherwise taken care of or treated at such times, case would be remanded for further proceedings consistent with view that such decree should be supported by clear, affirmative and guaranteeing evidence that welfare of children would not be jeopardized.

Perry & Perry, Logan, for appellant.

C. Preston Allen, Woodrow D. White, Salt Lake City, for respondent.

HENRIOD, Justice.

Appeal from those portions of a divorce decree which award property in lieu of alimony and the right of visitation with the children. Affirmed in part, reversed in part and remanded, with instructions. No costs awarded.

[1-3] The parties married on July 22, 1949, and had 2 children during the 2½ years they lived together. On January 5, 1952, plaintiff filed for divorce. A third child was born to the parties shortly thereafter. The case dragged on through a number of hearings until December 1953, nearly 2 years later, when a decree was entered awarding plaintiff a divorce, $25 per month support money for each child, custody of the children, subject to a right of visitation 3 times each month for 12 hours, and once a month for 2 days, with those children who had attained the age of

1. Barraclough v. Barraclough, 100 Utah 196, 111 P.2d 792; Callister v. Callister, 1 Utah 2d 34, 261 P.2d 944.

2. Allen v. Allen, 109 Utah 99, 165 P.2d 872; Tremayne v. Tremayne, 116 Utah 483, 211 P.2d 452.

36 months, defendant being allowed to take them from plaintiff's presence during such periods, and a one-half interest in a parcel of property owned by defendant During the protracted litigation, the parties and their counsel had stipulated that it would be agreeable if the court awarded $1,000 *cash* in lieu of alimony, payable in 6 months, and $30 per month as support money for each child. Such stipulation apparently lulled plaintiff into a false sense of security, sufficient to impel her to not proffer any evidence as to her ability to and need for support of the children. In so assuming she erred, since the trial court, in divorce matters, where the state is an interested party, need not abide, necessarily, with the terms of the litigants' stipulations,[1] although such stipulations should be respected and great weight given thereto. Plaintiff's only complaint in this respect, would be, not that the court was duty bound and erroneously refused to carry out the terms agreed upon, but that it abused its discretion by entering an inequitable decree,[2] a matter we must determine on review Unless there is a clear abuse of discretion, we cannot disturb the trial court on such matters, and we believe that the $25 per month awarded instead of the stipulated $30, and the one-half interest in about 50 acres of land instead of the agreed $1 000 cash, *under the facts of this case*, whose voluminous record cannot be detailed here, but where, however, there is evidence to show considerable self-sufficiency on the part of plaintiff, and a physical ailment on the part of defendant which was at least a threat to his earning capacity, was not such an abuse of discretion contemplated by the authorities as to warrant reversal.

[4 5] As to the award of visiting rights to the defendant, we are faced with a decidedly different problem—a smitting around which might affect the physical, moral and social welfare of 3 tots of tender years, even more than a defendant's failure to pay support money There is no evidence in the record that shows any lack of affection by either spouse and none to show that the defendant would harm, or that the children's welfare would be impaired, by the carrying out of the quite unusual order for visitation entered here On the other hand there is no evidence to show how these children would be housed when their father came and took them away, by whom they would be clothed, fed and otherwise taken care of, or otherwise how they might be treated. In cases where little children's welfare hangs in the balance, we cannot gamble it on an absence of evidence or on any presumption that tender care will be given by the natural parent. There should be clear, affirmative and guaranteeing evidence that the welfare of children such as these would not be jeopardized by execution of the order. No such evidence appears in this record, and we are compelled to remand the case with instructions to proceed n accordance with the views herein expressed as to rights of visitation.

McDONOUGH, C J, and CROCKETT and WADE, JJ, concur

WORTHEN, Justice (concurring in part and dissenting in part)

I agree with Mr Justice Henriod that this case must be remanded. I believe, however, that the court was in error in failing to award $30 per month support money for each child

In the case of Callister v Callister, 261 P 2d 944, this Court at page 946, after quoting Sec 30–3–5, U C A 1953, said

> "This court has held that, by reason of the statute, an agreement or stipulation between parties to a divorce suit as to alimony or *payments for support of children* is not binding upon the court in entering a divorce decree, but serves only as a recommendation, and t the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party, *based upon change of*

1. Barraclough v Barraclough 100 Utah 196 111 P 2d 792 Callister v Callister, 1 Utah 2d 34, 261 P 2d 944

2. Allen v Allen 109 Utah 99 165 P 2d 872 and cases cited therein Tremayne v Tremayne, 116 Utah 483, 211 P 2d 432

circumstances warranting such modification." (Emphasis ours)

The statement is salutory and intended to permit the trial court to look behind the stipulation and prevent fraud or coercion by one party upon the other, and to safeguard the interest and welfare of the children.

The father of three minor children had agreed that the court award to each child $30 per month support money *For reasons not readily apparent the trial court cut the award for each child to $25 per month.*

The court in finding of fact No. 6 found as follows.

"That the defendant is receiving from the U S Government as payment for partial disability incurred in the military service of the United States the sum of $102 00 per month, and he is also employed in Las Vegas, Nevada, and is earning $70 00 per week."

It was suggested that the court may have been influenced in its action by the defendant's disability, but if that disability makes it impossible for him to continue to earn the $70 per week he is earning, then the court could reduce the amount if the changed condition warrants a reduction But if the award of $25 per child (per month) is permitted to stand, then no additional award may be made without showing either increased earnings by defendant or greater need on the part of plaintiff

However, while defendant has an income of approximately $400 per month, I am unwilling to approve an award of $75 for the support of his three children leaving him $325 with which to make four trips per month from Las Vegas to Cache County to visit his children More money even at the expense of fewer visits will in my opinion promote the best interest of the children.

The rule announced in the case of Callister v Callister, supra, that stipulations are recommendations only, should not be permitted to make a father s duty to his minor children less than he admits it should be Such an unconscionable award only tends to add to the public expense for the care of dependent children

The trial court should be directed to increase the award for the children from $25 to $30 per month per child unless changed conditions are shown after further hearing justifying the award of only $25 per child.

Pearl B. RUNYON and George Rosenquist et al., Appellees,

v.

CITY OF NEOSHO RAPIDS, Kansas, et al., Appellants.

No. 49129.

Court of Appeals of Kansas.

Nov. 3, 1978.

Electors of city brought mandamus action against city and its governing body to require city to comply with statute requiring city to conduct audit upon petition by 20% or more of city's voters. The Lyon District Court, R. E. Miller, J., entered amended order requiring audit and awarding attorney fees to plaintiffs, and defendants appealed. The Court of Appeals, Foth, C. J., held that: (1) since city's concept of what was required of it by stipulation entered into by the parties and approved by court was entirely different from concept entertained by plaintiffs and trial court, court was authorized to vacate its original order based upon stipulation and to replace it with one which clearly expressed parties' true obligations, and (2) evidence concerning city's delay in conducting audit and absence of excuse for city's nonaction supported award of attorney fees.

As modified, affirmed.

1. **Stipulations** ⇐13

Parties may be relieved of their stipulations for mistake, accident, surprise, inadvertence or improvidence.

2. **Stipulations** ⇐13

Where defendants' concept of what was required of them by stipulation entered into by parties and approved by court was totally different from that of plaintiffs and court which approved stipulation, court was authorized to vacate its original order based upon stipulation and to replace it with one which clearly expressed parties' true obligations. Rules of Civil Procedure, rule 60(b), K.S.A. 60–260(b).

3. **Mandamus** ⇐177

Attorney fees are allowable as damages in mandamus where there has been unreasonable refusal to perform duty imposed by law.

4. **Mandamus** ⇐177

In mandamus action brought by electors of city of the third class to compel city to order audit of its books pursuant to statute requiring such audit upon written petition of 20% or more of city's voters, evidence concerning city's delay in face of request for audit and absence of excuse for city's nonaction was sufficient to support award of attorney fees to plaintiffs on ground of unreasonable refusal to perform duty imposed by law. K.S.A 75–1125.

Syllabus by the Court

1. Under K.S.A. 75–1125, when a proper petition is presented to the governing body of any municipality not required by law to have an annual audit, it is the duty of the governing body to order the audit requested in the petition. The statute is mandatory, and compliance may be compelled by mandamus.

2. Parties may be relieved of their stipulations for mistake, accident, surprise or inadvertence. The same kinds of factors are grounds for vacating a judgment under K.S.A. 60–260(*b*)(1).

3. Where the construction put on court-approved stipulation by one party is totally different from that of the other party and the court which approved it, the court is authorized to relieve the other party of the stipulation and to modify its order based thereon so as to clearly express the parties' true obligations.

4. Attorney fees are allowable as damages in mandamus where there has been an unreasonable refusal to perform a duty imposed by law

5. In a mandamus action to compel a city of the third class to order an audit of its books it is *held* the trial court did not err in amending its original order or in allowing attorney fees.

Duane D. Guy, Emporia, for appellants.

Mark L. Yates and Gerald D. Lasswell, of Stinson, Wisdom & Lasswell, of Wichita, for appellees.

Before FOTH, C. J., and SPENCER and MEYER, JJ.

FOTH, Chief Judge:

This is an appeal by the defendants, the City of Neosho Rapids and its governing body, from an order in mandamus requiring an audit of the city's books and an order allowing attorney fees to the plaintiffs.

On January 12, 1976, plaintiffs, electors of the city, filed a petition with the governing body requesting an audit of the city's finances for the preceding six year period. Neosho Rapids being a city of the third class a regular annual audit is not required by statute, but the city is governed by K.S.A. 75–1125 (Weeks 1969), and particularly the relevant proviso:

"*Provided, That upon a written petition filed with the governing body of any such municipality not provided for by section 12 [75–1122] of this act by 20% or more of the voters* of said municipality who voted at the last election for officers of such municipality *it shall be the duty of said governing body to employ a licensed municipal public accountant* or accountants or certified public accountant or accountants to examine and audit the accounts of such municipality for such period of time as may be set out in the petition of the voters." (Emphasis added.)

The petition filed contained sufficient signatures, and under the statute it thereupon became "the duty of [the] governing body" to order the audit requested. When this governing body failed to act for three months, plaintiffs commenced this action on April 6, 1976, to compel compliance with the statute.

The litigation dragged on until December, when the parties entered into a stipulation designed to settle the controversy. Under the stipulation the city was to order an audit by designated auditors, to cover the years 1970 through 1973, and to include a verification of all expenditures. The stipulation contained the following conditions:

"D. No damages shall be awarded or paid to Plaintiffs other than reasonable attorney's fees as may hereinafter be stipulated to between the parties or ordered by the Court.

"E. This agreement, the performance hereunder by the Defendants and performance of Defendants by reason of any order of mandamus issued by the District Court of Lyon County, Kansas, pursuant to this agreement, shall be subject to authority granted by the Board of Tax Appeals of the State of Kansas to the Defendants to issue no-fund warrants in the amount sufficient to cover the costs and expenses of litigation between the parties and the costs of the audit."

The stipulation was submitted to and approved by the trial court, which entered an order on December 16, 1976, incorporating the substance of the stipulation in its decree, including the conditional language of paragraph "E" above.

The city proceeded with its pending application to the Board of Tax Appeals for authority to issue no-fund warrants. That body, after a hearing, denied the application, whereupon the city took the position that its entire obligation in the matter was ended. Plaintiffs, however, returned to the trial court with motions for attorney fees, to vacate the December order, and for a contempt citation. The trial court awarded attorney fees and in May, 1977, conducted a hearing on the other matters raised.

The primary issue before the trial court was whether the action of the Board of Tax Appeals relieved the city of its statutory duty because of the wording of the original stipulation and order of December 16, 1976. The court found that the provisions of K.S.A. 75–1125 are mandatory and that the Board of Tax Appeals has no authority to relieve the governing body of its statutory duty. Most importantly, the trial court found that its order of December 16 had not been intended to make compliance totally dependent on the action of the Board, but

only that the time of compliance would depend on the Board's order.

[1, 2] Based on this finding, and relying on its authority to vacate judgments under K.S.A. 60–260(*b*), the court modified the crucial decretal paragraph of its original mandamus order from:

> "IT IS FURTHER BY THE COURT ORDERED that performance by Defendants of this order of mandamus shall be subject to authority granted by the Board of Tax Appeals of the State of Kansas to the City of Neosho Rapids, Kansas, to issue no-fund warrants in an amount sufficient to pay the expenses of litigation and the expenses of preparation of the audit."

to read:

> "IT IS FURTHER BY THE COURT ORDERED that performance by defendant of the order of mandamus shall be subject to the further order of the court as to the time of performance and defendant's (sic) shall have a reasonable time in which to secure funds for such purpose and in the necessary sum to pay costs of audit and litigation. The Court will thereupon set the date for commencement of the audit, the same to be within a reasonable time. Defendants are ordered to advise the Court of the costs forthwith."

It is from this amended order that defendants appeal. The city argues first that the court had no authority to modify its order because it was based on a stipulation of the parties. However, parties may be relieved of their stipulations for mistake, accident, surprise, inadvertence or improvidence. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 512 P.2d 438 (1973); *Bodle v. Balch*, 185 Kan. 711, 347 P.2d 378 (1959). Those factors closely parallel the grounds for vacating a judgment under K.S.A. 60–260(*b*)(1).

The trial court found that the stipulation and its order both contemplated that the Board of Tax Appeals would grant no-fund warrant authority as a matter of routine, based on the city's good faith application. In fact, the court found, the city's agents made it clear to the Board that they did not really want the authority they nominally sought, and the Board's denial was the natural result of the presentation made to the Board. The court's finding that the defendants did not act in good faith in presenting the application is amply supported by the record. It is apparent that the city's concept of what was required of it by the stipulation and order was entirely different from the concept entertained by the plaintiffs and the trial court. (It is clear that if the court had thought it meant what the city claimed it would never have approved the stipulation.) That difference was sufficient ground for the court to vacate its original order and replace it with one which clearly expressed the parties true obligations. The motion to vacate was addressed to the trial court's discretion. *Baker v. Baker*, 217 Kan. 319, 320, 537 P.2d 171 (1975), and cases cited therein. We are unable to find an abuse of discretion here.

As to attorney fees, the original stipulation called for them to be determined by later agreement or by the court. There was apparently an agreement at one time, but it seems to have foundered in the Board of Tax Appeals hearing. Under the stipulation it thereupon fell to the court to fix them, and defendants are not in a position to complain.

[3, 4] In addition, fees are allowable as damages in mandamus where there has been an unreasonable refusal to perform a duty imposed by law. *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 438 P.2d 732 (1968). Although no evidence on this issue was presented at the special hearing devoted to attorney fees, the court had before it the three month delay between the request for an audit and the commencement of the action, and the absence of any excuse for the city's non-action. Those facts were enough to make a *prima facie* case of unreasonableness. The city even now offers no reason for its failure to act beyond a suggestion that the statute may be unconstitutional because it contains no limit on the time to be covered by the audit. We conclude that the award of attorney fees is supported by the record.

The other issue raised—the impoundment of certain books—was conceded by the city at oral argument not to be properly before us and we need not consider it.

Plaintiffs have requested additional attorney fees for services on appeal. Considering the nature of the case and the fact that these fees are to be paid from public funds, it is this court's opinion that the $3,300 allowed below should be sufficient to cover services in this court as well. We do allow expenses as itemized in the amount of $259 82, and the judgment below is modified to that extent.

As so modified, the judgment is affirmed.

In the Interest of Kathleen PENN, a minor.

No. 49431.

Court of Appeals of Kansas.

Nov 3, 1978.

Biological parents appealed from an order of the Wyandotte District Court, Dean J Smith, J., permanently severing their parental rights. The Court of Appeals, Parks, J , held that evidence was sufficient to support trial court's finding of unfitness and its order of parental severance.

Affirmed.

1. Infants ⇐16.15

In reviewing sufficiency of evidence to support a finding of parental unfitness, evidence is viewed from the aspect most favorable to findings made by trial court.

2. Infants ⇐16.8

Parent will not be permanently deprived of parental rights with respect to a dependent and neglected child unless there is clear and convincing evidence

3. Infants ⇐16.3

As applied to the relation of rational parents to their child, the word "unfit" *usually, although not necessarily, imports* something of moral delinquency; incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from any other defects. K.S.A. 38–824(c)

See publication Words and Phrases for other judicial constructions and definitions.

4. Infants ⇐16.3

Inherent mental and emotional incapacity to perform parental obligations can constitute such breach of parental duty as to make the parents unfit to be entrusted with custody of their child. K.S.A. 38–824(c).

5. Infants ⇐16.8

Evidence in proceeding for term nation of parental rights was sufficient to support trial court's finding of unfitness and its *order of parental severance.* K.S.A. 38–824(c).

Syllabus by the Court

1. Inherent mental and emotional incapacity to perform parental obligations can constitute such breach of parental duty as to make the parents unfit to be entrusted with custody of their child under K.S.A. 1977 Supp 38–824(c)

2. In a proceeding for permanent deprivation of parental rights in a dependent and neglected child, the record is examined and it is *held* that the trial court's finding of parental unfitness and the severance order are supported by clear and convincing evidence.

George W Thomas and Steven D Alexander, Kansas City, for appellants.

Muriel Andreopoulos, Asst. Dist. Atty., Curt T. Schneider, Atty Gen., and Nick A. Tomasic, Dist. Atty , for appellee.

Before PARKS, P J., and SWINEHART and MEYER, JJ

the road "as now constructed and in use." The Reynolds argue that this language limits the right-of-way to the types of uses extant in 1962, and that the Keenes had not previously used the road to haul timber. Thus, Mrs. Reynolds argued, she had a right to prevent attempts to haul timber over the road.

In its memorandum opinion, designated to constitute findings of fact, conclusions of law, and final judgment, the court refused to hold Mrs. Reynolds in contempt. After discussing various other issues not relevant to this appeal, the court addressed the defense raised by Mrs. Reynolds that the Keenes had no right to haul timber over the road. The opinion declares: " * * * it is the conclusion of the Court that the decreed right-of-way in 1963 was a right-of way for a road for all purposes." Plaintiffs-appellants appeal from that part of the opinion concluding that the 1963 right-of-way was for all purposes, claiming that it substantially and improperly alters the 1963 decree to their detriment.

The contumacious conduct complained of consisted of alleged violations of the 1963 order that the Reynolds not interfere with the use of the right-of-way by the Keenes. In determining whether Mrs. Reynolds violated that order, it was necessary for the court to determine the extent of the Keenes' right to use the road, with the ultimate purpose of determining whether they were using the road in a manner which was protected from interference by the 1963 decree.

[2] It cannot be said that the meaning attributed to the 1963 order by the district court was incorrect. That part of that decree declaring a right-of-way "as now constructed and in use * * *," does seem somehow to limit the Keenes' right; however, the meaning of that language is far from clear. Language in that decree also prohibits interference by the Reynolds of any use of the road for "either business or pleasure purposes," which seems to imply that a less limited right was found. Further support for the limitation urged by appellants is not found in the record, as the parties waived findings of fact and conclusions of law in 1963. Thus, it cannot be said that the district court erred here in concluding that the existing right-of-way was declared in 1963 to be for all purposes.

The order of the district court is affirmed. Costs to respondents.

DONALDSON, SHEPARD and BAKES, JJ., and SCOGGIN, D. J., concur.

98 Idaho 110

Wesley B. THOMPSON, Plaintiff-Respondent,

v.

Paul TURNER, Defendant-Appellant.

No. 12066.

Supreme Court of Idaho.

Jan. 20, 1977.

Vendor brought action against purchaser in which vendor sought, on theory that conveyance of real property was void due to fraud and lack of consideration, to have conveyance set aside, to quiet title and to obtain money judgment for portions of loans converted by purchaser to his own use. The District Court, Seventh Judicial District, Bonneville County, Boyd R. Thomas, J., granted vendor's motions for a change of venue and for consolidation, and denied motion to dismiss, and purchaser appealed. The Supreme Court, Donaldson, J., held that appeal could not be taken from orders granting motion for consolidation and denying motion to dismiss; that denial of prior motion by vendor for change of venue was not res judicata in regard to his subsequent motion for change of venue; that trial court did not abuse its discretion in granting the subsequent motion for change of venue back to county in which action was originally filed and in thus relieving vendor of a stipulation to the initial change of venue; that statute, which provides that specified actions relating to real

property "must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial," does not limit subject matter jurisdiction of lower courts.

Order granting motion for change of venue affirmed.

1. Appeal and Error ⇐85, 105

Appeal could not be taken from orders granting motion for consolidation of actions and denying motion to dismiss. I.C. § 13–201.

2. Venue ⇐78

Denial of plaintiff's motion for change of venue was not res judicata in regard to plaintiff's subsequent motion for change of venue.

3. Stipulations ⇐13

It is within sound discretion of a trial court, for good cause shown and in furtherance of justice, to relieve a party from a stipulation.

4. Venue ⇐82

In vendor's action against purchaser to have conveyance of real property set aside, to quiet title and to obtain money judgment for portions of loans converted by purchaser to his own use, trial court did not abuse its discretion, in granting vendor's motion for change of venue back to county in which action was originally filed and in thus relieving vendor of a stipulation to the initial change of venue, where the motion was granted for purpose of permitting the action to be consolidated with two other cases which involved same property and in which vendor and purchaser were defendants. I.C. § 5–401.

5. Venue ⇐5.3(1)

Statute, which provides that specified actions relating to real property "must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial," does not limit subject matter jurisdiction of lower courts; overruling Banbury v. Brailsford, 158 P.2d 826. I.C. §§ 5-401, 5–406, 5–409.

Reginald R. Reeves, of Denman, Reeves & Ohman, Idaho Falls, for defendant-appellant.

W. Joe Anderson, of Sharp, Anderson & Bush, Idaho Falls, Sherman F. Furey, Jr., Salmon, for plaintiff-respondent.

DONALDSON, Justice.

The central issue presented by this appeal is whether it is an abuse of discretion for the trial court to grant a motion changing venue back to the county from which the case had been transferred by stipulation of the parties. Under the facts of this case, we hold that it was not.

On April 6, 1972, plaintiff-respondent Wesley B. Thompson conveyed certain real property located in Lemhi County to defendant-appellant Paul Turner. Shortly after the conveyance, appellant Turner obtained a $200,000 loan from Mutual Life Insurance Company (hereinafter Mutual) which was secured by a mortgage on the property. He later obtained another $200,000 loan from Valley Bank, Inc., (hereinafter Valley) which was also secured by a mortgage on the real property.

On April 15, 1974, respondent Thompson instituted this action against appellant alleging the conveyance was void due to fraud and lack of consideration. He sought to set the conveyance aside, to quiet his title in the real property, and to obtain a money judgment for the portions of the loans which were converted by appellant Turner to his own use. The action was originally filed in Lemhi County but was transferred to Bonneville County pursuant to stipulation of the parties. Subsequent to the initiation of this action, both Mutual and Valley began proceedings in Lemhi County to foreclose their mortgages. In each action respondent Thompson asserted a cross-claim against appellant seeking the same relief requested in this action. On July 30, 1975, upon motion by respondent, the court ordered that the venue of this action be changed from Bonneville back to Lemhi County, and that this action be con-

solidated with the foreclosure proceedings begun by Mutual and Valley.

[1] Appellant assigns as error the orders of the trial court granting respondent's motions for a change of venue and for consolidation, and denying his motion to dismiss. We will consider only the order granting the change of venue since appeal from the latter two orders is not authorized. I.C. § 13–201; *Wilson v. DeBoard*, 94 Idaho 562, 494 P.2d 566 (1972).

Appellant contends that the trial court should have denied the motion for two reasons: (1) its denial of a previous motion by respondent for a change of venue was res judicata and (2) the parties stipulated to the original change from Lemhi to Bonneville County. Respondent counters that under *Banbury v. Brailsford*, 66 Idaho 262, 158 P.2d 826 (1945), the Court was required to grant the motion because it lacked subject-matter jurisdiction to try the case.

[2] Appellant's argument based upon the doctrine of res judicata must fail. An order denying a motion for a change of venue is not a judgment subject to that doctrine. As to the stipulation, the trial court decided that the proper venue for this action was Lemhi County since it is an action for the determination of an interest in real property. I.C. § 5–401. Therefore, the question is whether it erred in relieving respondent of the stipulation and transferring the case back to Lemhi County.

[3, 4] It is within the sound judicial discretion of a trial court, for good cause shown and in furtherance of justice, to relieve a party from a stipulation. *Loughrey v. Weitzel*, 94 Idaho 833, 498 P.2d 1306 (1972); *Call v. Marler*, 89 Idaho 120, 403 P.2d 588 (1965). The trial court granted the change of venue so that this case could be consolidated with those instituted by Mutual and Valley. All three cases involve the same real estate, and both appellant and respondent are defendants in the other two cases. The trial court determined that consolidating the cases would reduce costs and delay, that it would be more convenient for the parties and witnesses, and that it would be in the best interests of justice. Under the circumstances, we cannot say that it abused its discretion in relieving respondent of the stipulation and in granting the motion to change venue back to Lemhi County.

[5] Although we uphold the action of the trial court, we do not do so for the reason urged by respondent. The Court in *Banbury v. Brailsford, supra*, stated that in enacting I.C. § 5–401,[1] the legislature intended to limit the jurisdiction of the lower courts. Only a court in the county in which real property is located has subject-matter jurisdiction to try an action affecting the title to or possession of that real property. After reviewing the decision, however, we find the dissent of Justice Givens to be persuasive. For the following reasons we hold that the *Banbury* Court was incorrect insofar as it stated that I.C. § 5–401 limits the subject-matter jurisdiction of the lower courts.

Idaho Code § 5–401 was originally enacted in 1881 as § 205 of the Code of Civil Procedure. On its face it states that its provisions as to proper venue are "subject to the power of the court to change the place of trial." Section 210 of the Code of Civil Procedure permitted a change of venue in certain instances. It made no distinction between actions affecting real property and other types of actions. Section 213 of the Code of Civil Procedure expressly recognized that an action affecting the title to or possession of real estate could be brought in or transferred to a court of a county

1. "5–401 Actions relating to real property — Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this code

1 For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries to real property

2. For the partition of real property

3 For the foreclosure of a mortgage of real property Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action."

other than the county in which the real estate or some portion thereof was situated. The section provided that in such cases a copy of the final judgment would be transmitted to the clerk of the court of the county in which the real estate was situated.[2] It is obvious that had the legislature intended I.C. § 5–401 to limit the subject-matter jurisdiction of the lower courts, § 213 of the Code of Civil Procedure would have been a meaningless enactment.

The order of the district court granting the motion for a change of venue is affirmed. Costs to respondents.

McFADDEN, C. J., and SHEPARD, BAKES and BISTLINE, JJ., concur.

2. Section 210 of the Code of Civil Procedure was last compiled in I C § 5–406, and § 213 is compiled in I C § 5–409 Idaho Code § 5–406 was repealed as a procedural statute in conflict with or covered by the Idaho Rules of Civil Procedure Ch 242, § 1 [1975] Idaho Sess. Laws 651

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

CAROL ANN BARKER BROWN,	:	
Plaintiff,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	:	
BRYANT JEROME BROWN,	:	Civil No. D79-3802
Defendant.	:	Judge Sawaya

---oooOooo---

Defendant's Motion for an Order enforcing the provisions of an agreement entered into between the parties on the 5th of June, 1984, came on regularly for hearing on Monday, the 15th day of April, 1985, at the hour of 2:00 o'clock p.m. Defendant appearing in person and by his attorney B. L. Dart, and plaintiff appearing in person and by her attorney David A. McPhie, and the Court having heard the arguments and proffers of respective attorneys and having reviewed the file and being fully advised, hereby makes the following:

FINDINGS OF FACT

1. Following the filing of plaintiff's Petition for Modification and defendant's Counter Petition, there was extensive discovery carried out between the parties following which the parties engaged in extensive negotiation through their respective attorneys.

2. On the 5th day of June, 1984, the parties appeared at a proceeding before a court reporter for the purpose of setting forth the terms of a settlement agreement which had been reached between the parties, and with both parties in attendance with their attorneys the terms of the agreement were read into the record with input provided by attorneys for both of the parties. At that time all issues were considered and an agreement was struck and entered on the record and all the parties and counsels consented to the terms either affirmatively or impliedly by not objecting to any of the terms of the Stipulation.

3. For a period from the 5th of June, 1984, until the 30th of November, 1984, plaintiff made no objection to the Stipulation which had been reached on the record and had been reduced to a written Stipulation and presented to her for her signature. During this period of time she received the additional financial benefits under the terms of the Stipulation which included an increase in the amounts paid by defendant to

plaintiff of $200 per month.

4. Plaintiff by her conduct is estopped from denying this agreement and defendant has relied to his detriment on plaintiff's acceptance of the benefits and equity dictates that the sanctity of that agreement should be preserved and should prevail.

From the foregoing findings of fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Defendant's Motion for an Order appproving and enforcing the settlement agreement is hereby granted.

2. The Stipulation of the parties is accepted by the Court and the Decree of Divorce heretofore entered in this action may be modified in accordance with that Stipulation as more fully hereinafter set forth.

3. The Decree of Divorce is modified to provide that plaintiff's award of alimony shall be reduced from the amount of $900 a month to the amount of $500 a month commencing with the month of July, 1984, and continuing thereafter for a period of two years or until plaintiff remarries whichever occurs first. Upon the happening of either event, alimony will terminate. Defendant's payment of alimony shall be due on or before the 5th day of each month.

So long as defendant has an obligation for alimony, he is ordered to maintain plaintiff as a named insured on a currently existing life insurance policy in the face amount of $50,000. Defendant is ordered to provide plaintiff with evidence that this life insurance is currently in force.

4. The Decree of Divorce is modified to provide that defendant's obligation to plaintiff for support shall be increased from a sum of $300 per month to a sum of $500 per month per child for each of the three minor children of the parties commencing with the month of July, 1984. Payments of support are due on or before the 5th day of each month and defendant's obligation for support shall continue to age 21 for any child who shall elect to serve a mission for the LDS Church, or shall elect to attend a college or university. For any such child over the age of 18 not living at home, the payment of support shall be paid by defendant directly to said child. If payment of support is not paid to said child by defendant, plaintiff shall retain the right for enforcement of collection.

As an additional obligation of support, defendant is ordered to pay for orthodontia treatment which has been provided to this time by Dr. Gary Stephens and to pay for any orthodontia and dentist expenses for any child so long as there is an obligation for the payment of support for said child. Defendant is further ordered to continue to maintain the children

on his health and accident insurance which has a $100 per child deductible. Plaintiff is ordered to provide to defendant all medical, dental and orthodontia bills within a reasonable amount of time not to exceed 30 days of when they are received. Any medical expenses not described or covered by insurance will be the responsibility of plaintiff.

As a further obligation for support, defendant is ordered to maintain in force his currently existing life insurance with the children named thereon as beneficiaries so long as defendant has an obligation for support. This life insurance policy has a $50,000 death benefit. So long as the life insurance policy is in force, if defendant's obligation to pay support for any child terminates, plaintiff will have the right to notify defendant of her desire to elect that the policy have the name or names of the non-supported child or children removed from the policy so that it retains only the supported children as named beneficiaries. Unless such an election is made by plaintiff, defendant shall retain all children as named beneficiaries on the life insurance policy until his obligation to support the last child is terminated.

5. Plaintiff is ordered to provide to defendant the account numbers of the Jordan Credit Union, Valley Bank/Olympus Branch, and Draper Bank accounts that are the accounts for the children awarded in the Decree of Divorce to be transferred to

plaintiff. Upon receipt of these account numbers, defendant is ordered to take whatever steps are necessary to have his name removed from the accounts so that plaintiff's name can be placed upon the accounts.

6. The Decree of Divorce should be modified to provide, in addition to what other rights of visitation the parties may in the future mutually agree upon, the following:

a. Defendant shall have the right to have the children with him on alternate weekends from Friday evening at 6:00 p.m. to Saturday evening at 6:00 p.m.

b. Plaintiff is ordered not to schedule any activities for the children which will in any way conflict with defendant's visitation time without first consulting with defendant and in the event the parties are not able to agree on such an activity being scheduled for defendant's visitation time, then either party will have the right to bring the matter before the Court for determination. In the event activities are scheduled as agreed upon or determined by the Court during defendant's visitation time, defendant is ordered to do whatever is necessary to see the children participate in that activity.

c. Plaintiff is ordered to provide defendant with a reasonable advance notice of any of the activities in which the children are involved and that there will be as much notice as possible of any of the activities of the children in which they

are performing in a competitive activity or in which they are participating or performing in front of an audience that includes other adults or parents.

d. Except for Christmas, defendant shall have the right to have the children on alternate holidays, and when those holidays are Monday holidays which come on the weekend defendant has visitation, he shall have the full weekend for three days including Monday, and on those weekends visitation shall be from Friday at 6:00 p.m. until Monday at 6:00 p.m.

e. Each Christmas holiday, defendant shall have the right to have the children commencing on Christmas Day at 1:00 p.m. for the remainder of the Christmas vacation until the commencement of school, unless there are less than five days of Christmas vacation before Christmas, in which event the parties agree time will be worked out so that plaintiff has the children with her at least five days during the Christmas break.

f. Defendant will have the right to have the children with him each summer for a month. During summer visitation while the children are in town, plaintiff will have the right to contact the children by telephone and they will have the right to contact her by telephone, and plaintiff shall be entitled to have one visit with them during that time.

The visitation each summer will be agreed upon between the parties. Commencing in 1986 defendant shall notify

plaintiff at least 60 days in advance of when he would like to have the month of visitation, and at the same time, the parties will reac an agreement as to the one day during the month of summer visitatio that plaintiff will have the right to visit.

The parties are ordered to consult with each other at least 90 days before the beginning of the summer of their anticipated schedules to be sure there are no conflicts and to try and resolve potential conflicts that might exist. If there is a conflict as to when defendant's summer visitation should occur, either party will have the right to ask the Court to resolve the conflict if they are not able to do so.

If the children are offered an opportunity to register for a summer activity that requires an early registration, plaintiff is ordered to notify defendant so that he can let plaintiff know whether this might conflict with his plans in the hope of avoiding a conflict.

g. Defendant will have the right to visit with the children frequently at times other than those outlined provided the visitation does not conflict with important activities in which the children are involved.

h. Either defendant or his present wife shall have the right to pick up and return the children. In the event defendant's current wife is picking up the children, she will honk for the children in the driveway. If the children do not

come or she is not notified when the children will be there, then after waiting five minutes, she will have the right to go to the door to get that information.

i. At any time defendant is exercising visitation and will be taking the children out of town, defendant is ordered to provide plaintiff an itinerary so that she will know where the children are. Plaintiff is ordered whenever she takes the children out of town, to provide defendant with an itinerary so that he will know where the children are.

7. Defendant is ordered to pay the sum of $1,500 toward plaintiff's attorney's fees which shall be paid by defendant within 30 days of billing by plaintiff's attorney.

DATED this 1st day of May, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk

By _____
Deputy Clerk

_____
District Judge

MAILING CERTIFICATE

I hereby certify that on the 30th day of April, 1985, I mailed a copy of the foregoing Findings of Fact and Conclusions of Law to:

David A. McPhie
Attorney for Plaintiff
147 North 200 West
Salt Lake City, UT 84103

_____

207

B. L. DART (818)
Attorney for Defendant
310 South Main
Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

CAROL ANN BARKER BROWN,	:	
Plaintiff,	:	ORDER
v.	:	
BRYANT JEROME BROWN,	:	Civil No. D79-3802
Defendant.	:	Judge Sawaya

---oooOooo---

Defendant's Motion for an Order enforcing the provisions of an agreement entered into between the parties on the 5th of June, 1984, came on regularly for hearing on Monday, the 15th day of April, 1985, at the hour of 2:00 o'clock p.m. Defendant appearing in person and by his attorney B. L. Dart, and plaintiff appearing in person and by her attorney David A. McPhie, and the Court having heard the arguments and proffers of respective attorneys and having reviewed the file and having made and entered it's Findings of Fact and Conclusions of Law, now therefore,

Appendix "G"

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant's Motion for an Order appproving and enforcing the settlement agreement is hereby granted.

2. The Stipulation of the parties is accepted by the Court and the Decree of Divorce heretofore entered in this action is hereby stipulated in accordance with that Stipulation as more fully hereinafter set forth.

3. The Decree of Divorce is modified to provide that plaintiff's award of alimony shall be reduced from the amount of $900 a month to the amount of $500 a month commencing with the month of July, 1984, and continuing thereafter for a period of two years or until plaintiff remarries whichever occurs first. Upon the happening of either event, alimony will terminate. Defendant's payment of alimony shall be due on or before the 5th day of each month.

So long as defendant has an obligation for alimony, he is ordered to maintain plaintiff as a named insured on a currently existing life insurance policy in the face amount of $50,000. Defendant is ordered to provide plaintiff with evidence that this life insurance is currently in force.

4. The Decree of Divorce is modified to provide that defendant's obligation to plaintiff for support shall be increased from a sum of $300 per month to a sum of $500 per month per child for each of the three minor children of the parties

commencing with the month of July, 1984. Payments of support are due on or before the 5th day of each month and defendant's obligation for support shall continue to age 21 for any child who shall elect to serve a mission for the LDS Church, or shall elect to attend a college or university. For any such child over the age of 18 not living at home, the payment of support shall be paid by defendant directly to said child. If payment of support is not paid to said child by defendant, plaintiff shall retain the right for enforcement of collection.

As an additional obligation of support, defendant is ordered to pay for orthodontia treatment which has been provided to this time by Dr. Gary Stephens and to pay for any orthodontia and dentist expenses for any child so long as there is an obligation for the payment of support for said child. Defendant is further ordered to continue to maintain the children on his health and accident insurance which has a $100 per child deductible. Plaintiff is ordered to provide to defendant all medical, dental and orthodontia bills within a reasonable amount of time not to exceed 30 days of when they are received. Any medical expenses not described or covered by insurance will be the responsibility of plaintiff.

As a further obligation for support, defendant is ordered to maintain in force his currently existing life

insurance with the children named thereon as beneficiaries so long as defendant has an obligation for support. This life insurance policy has a $50,000 death benefit. So long as the life insurance policy is in force, if defendant's obligation to pay support for any child terminates, plaintiff will have the right to notify defendant of her desire to elect that the policy have the name or names of the non-supported child or children removed from the policy so that it retains only the supported children as named beneficiaries. Unless such an election is made by plaintiff, defendant shall retain all children as named beneficiaries on the life insurance policy until his obligation to support the last child is terminated.

5. Plaintiff is ordered to provide to defendant the account numbers of the Jordan Credit Union, Valley Bank/Olympus Branch, and Draper Bank accounts that are the accounts for the children awarded in the Decree of Divorce to be transferred to plaintiff. Upon receipt of these account numbers, defendant is ordered to take whatever steps are necessary to have his name removed from the accounts so that plaintiff's name can be placed upon the accounts.

6. The Decree of Divorce is hereby modified to provide, in addition to what other rights of visitation the parties may in the future mutually agree upon, the following:

a. Defendant shall have the right to have the children with him on alternate weekends from Friday evening at 6:00 p.m. to Saturday evening at 6:00 p.m.

b. Plaintiff is ordered not to schedule any activities for the children which will in any way conflict with defendant's visitation time without first consulting with defendant and in the event the parties are not able to agree on such an activity being scheduled for defendant's visitation time, then either party will have the right to bring the matter before the Court for determination. In the event activities are scheduled as agreed upon or determined by the Court during defendant's visitation time, defendant is ordered to do whatever is necessary to see the children participate in that activity.

c. Plaintiff is ordered to provide defendant with a reasonable advance notice of any of the activities in which the children are involved and that there will be as much notice as possible of any of the activities of the children in which they are performing in a competitive activity or in which they are participating or performing in front of an audience that includes other adults or parents.

d. Except for Christmas, defendant shall have the right to have the children on alternate holidays, and when those holidays are Monday holidays which come on the weekend defendant has visitation, he shall have the full weekend for

three days including Monday, and on those weekends visitation shall be from Friday at 6:00 p.m. until Monday at 6:00 p.m.

e. Each Christmas holiday, defendant shall have the right to have the children commencing on Christmas Day at 1:00 p.m. for the remainder of the Christmas vacation until the commencement of school, unless there are less than five days of Christmas vacation before Christmas, in which event the parties agree time will be worked out so that plaintiff has the children with her at least five days during the Christmas break.

f. Defendant will have the right to have the children with him each summer for a month. During summer visitatio while the children are in town, plaintiff will have the right to contact the children by telephone and they will have the right to contact her by telephone, and plaintiff shall be entitled to have one visit with them during that time.

The visitation each summer will be agreed upon between the parties. Commencing in 1986 defendant shall notify plaintiff at least 60 days in advance of when he would like to have the month of visitation, and at the same time, the parties will rea an agreement as to the one day during the month of summer visitatic that plaintiff will have the right to visit.

The parties are ordered to consult with each other at least 90 days before the beginning of the summer of

their anticipated schedules to be sure there are no conflicts and to try and resolve potential conflicts that might exist. If there is a conflict as to when defendant's summer visitation should occur, either party will have the right to ask the Court to resolve the conflict if they are not able to do so.

If the children are offered an opportunity to register for a summer activity that requires an early registration, plaintiff is ordered to notify defendant so that he can let plaintiff know whether this might conflict with his plans in the hope of avoiding a conflict.

g. Defendant will have the right to visit with the children frequently at times other than those outlined provided the visitation does not conflict with important activities in which the children are involved.

h. Either defendant or his present wife shall have the right to pick up and return the children. In the event defendant's current wife is picking up the children, she will honk for the children in the driveway. If the children do not come or she is not notified when the children will be there, then after waiting five minutes, she will have the right to go to the door to get that information.

i. At any time defendant is exercising visitation and will be taking the children out of town, defendant is ordered to provide plaintiff an itinerary so that she will

know where the children are. Plaintiff is ordered whenever she takes the children out of town, to provide defendant with an itinerary so that he will know where the children are.

7. Defendant is ordered to pay the sum of $1,500 toward plaintiff's attorney's fees which shall be paid by defendant within 30 days of billing by plaintiff's attorney.

DATED this 1st day of May, 1985.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk

By _____
Deputy Clerk

_____
District Judge

MAILING CERTIFICATE

I hereby certify that on the 30th day of April, 1985, I mailed a copy of the foregoing Order to:

David A. McPhie
Attorney for Plaintiff
147 North 200 West
Salt Lake City, UT 84103

_____

FILED

Clerk / Sampson

EARL S. SPAFFORD
Attorney for Plaintiff
431 South Third East
Salt Lake City, Utah 84111
Telephone: 531-8020

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CAROL ANN BARKER BROWN	:	
Plaintiff,	:	DECREE OF DIVORCE
vs.	:	D# 136 NC 1120
BRYANT JEROME BROWN	:	1-1 79 - 9 33 PM
Defendant.	:	Civil No. [illegible]

THE ABOVE-ENTITLED MATTER came on for hearing before the above-entitled Court on the 2nd day of January, 1980. The Honorable Christine Durham District Judge, presided. The Plaintiff appeared in person and through her attorney, Earl S. Spafford. The Court heard evidence in support of Plaintiff's Complaint and now being fully advised in the premises, having heretofore entered its Findings of Fact and Conclusions of Law, and for good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiff is hereby granted a Decree of Divorce from the Defendant, dissolving the bonds of matrimony heretofore existing between the parties. Said Decree shall become final forthwith.

2. Plaintiff is awarded the minor children of the parties subject to reasonable rights of visitation by the Defendant, which rights of visitation should include the following:

(a) Defendant's visiting privileges shall include a minimum of every other weekend, not to interfere with the

children's regularly scheduled activities, such as Sunday School. It is contemplated that the children will spend Friday evening and Saturday with the defendant, and be returned to the plaintiff by Saturday evening.

(b) Defendant shall be able to have the children in his home on alternate holidays, with the exception that Christmas mornings, the children shall be with the plaintiff. Defendant may be able to visit with the children in his home, Christmas Eve, Christmas Day, or as agreed mutually by the parties.

(c) Defendant's visiting privileges shall not be limited to the above situations if the parties mutually agree upon visiting privileges at other reasonable and convenient times.

(d) Defendant may have certain time during the summer months where he would be able to take the children on a vacation for a week or two. It is reasonable that the defendant be able to take the children on such a vacation if the plaintiff's, defendant's and the children's schedule can accommodate said vacation time.

(e) It is reasonable that the plaintiff and defendant cooperate with respect to notifying each other of their respective schedules and the intended visits.

3. During the marriage but prior to the separation of the parties the parties have incurred miscellaneous debts and obligations which the Defendant should be required to pay, except the home mortgage which plaintiff should pay.

4. That the property of the parties should be divided.

5. The residence of the parties located at 3195 South 2794 East, Salt Lake City, Utah, to the plaintiff with the understanding and provision that the plaintiff shall assume and make the mortgage payments, tax payments, insurance payments,

and other payments associated with said house. Defendant shall provide the plaintiff with a Quit-Claim deed at the time of the signing of the Decreee of Divorce. The home furnishings, including the grand piano and grandfather clock, to the plaintiff with the exception of the antiques which belonged to the defendant's grandmother and the stereo speakers be awarded to the defendant. The dinner ring to the plaintiff.

6. It is reasonable that the defendant pay child support in the amount of $300.00 per child ($900.00 per month for all children) per month to continue until the child shall reach the age of eighteen (18); the child shall marry; or the child shall become self-supporting. Said child support shall be continued to age twenty-one (21) if a child shall elect to serve a mission for the LDS Church or if a child shall elect to attend college or university.

DATED this 7th day of January, 1980.

BY THE COURT:

JUDGE